88-1014

No.

SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BROTHERHOOD OF RAILWAY CARMEN,
DIVISION OF TRANSPORTATION•COMMUNICATIONS
INTERNATIONAL UNION,
Petitioner,

v.

CSX TRANSPORTATION, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Do the United States District Courts have jurisdiction under 28 U.S.C. § 1337(a) to enforce the commands of the Railway Labor Act when the rail carrier which is claimed to have violated the Railway Labor Act, asserts immunity from Railway Labor Act obligations by virtue of having been subject to an ICC order approving a transaction described in 49 U.S.C. § 11343 (a)?

2. Does 49 U.S.C. § 11341(a) immunize a rail carrier from Railway Labor Act collective bargaining agreement obligations otherwise applicable to changes in operations, services and facilities made feasible by a transaction approved under 49 U.S.C. §§ 11343(a) and 11344 some six years after that transaction has been consummated?

3. Does the ICC or the district courts have jurisdiction to determine whether the "necessity" requirement of 49 U.S.C. § 11341(a) has been met thereby exempting a rail carrier from its obligations under "other law"?*

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* The parties to the proceeding below are:

Appellant below and Petitioner here:

Brotherhood of Railway Carmen, Division of Transportation•Communications International Union (TCU)

Appellee below and Respondent here:

CSX Transportation, Inc.

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CSX TRANSPORTATION, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner Brotherhood of Railway Carmen, Division of Transportation•Communications International Union [hereinafter, "BRC"] respectfully requests this Court to issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit to review the judgment of that court in *BRC v. CSX Transportation, Inc.*, 11th Cir. No. 87-8466, decided September 19, 1988.

OPINIONS BELOW

The *per curiam* decision of the Eleventh Circuit is reported at 855 F.2d 745; it is reproduced as Appendix A to this Petition at pages 1a-10a. The judgment of the appellate court is reproduced as Appendix D at pages 47a-48a. The decision of the United States District Court for the Southern District of Georgia is reported at 662 F.Supp. 1409 and is reproduced herein as Appendix B at pages 11a-22a.

JURISDICTION

On September 19, 1988, the United States Court of Appeals for the Eleventh Circuit issued a *per curiam* decision vacating the judgment of the United States District Court for the Southern District of Georgia and remanding the case to that court with instructions to dismiss the complaint for lack of subject matter jurisdiction. Petitioner is seeking to invoke this Court's jurisdiction under 28 U.S.C. § 1254(1) to review that judgment. This petition is timely filed since it is being filed within the time period provided by 28 U.S.C. § 2101(c).

STATUTES INVOLVED

This case involves the relationship between two Acts of Congress, each of which regulates a different aspect of interstate commerce—*i.e.*, the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, and the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.* In particular, this case involves the impact of Sections 11341(a) and 11347 of the Interstate Commerce Act, 49 U.S.C. §§ 11341(a) and 11347, on the obligations imposed upon carriers by Sections 2 First, 2 Seventh, 5 First, and 6 of the Railway Labor Act, 45 U.S.C. §§ 152 First, 152 Seventh, 155 First and 156, and on the federal courts' jurisdiction to enforce those obligations. Section 7 First of the Railway Labor Act, 45 U.S.C. § 157 First, Sections 11343(a) and 11344 of the Interstate Commerce Act, 49 U.S.C. §§ 11343(a), 11344, and Section 405(b) of the Rail Passenger Service Act, 45 U.S.C. § 565(b), along with 28 U.S.C. § 1337(a), are also relevant to this case. The relevant statutes are reproduced as Appendix E at pages 49a-56a.

STATEMENT OF THE CASE

Respondent CSX Transportation, Inc. ("CSXT") is a carrier by railroad and a subsidiary of CSX Corporation ("CSX"). CSX is a holding company which was formed in about 1980 to acquire and assimilate by merger two

other holding companies, Chessie System, Inc. ("Chessie") and Seaboard Coast Line Industries, Inc. ("SCLI"). These latter holding companies controlled two competing railroad systems that themselves had been formed through earlier mergers. Chessie owned or controlled a number of railroad properties including the Chesapeake and Ohio Railway Company ("C&O") and SCLI controlled, among other railroads, the Seaboard Coast Line Railroad Company ("SCL").[1] Because CSX would control two railroad carriers by its acquisition and merger of Chessie and SCLI, it was necessary for it to obtain Interstate Commerce Commission ("ICC" or "Commission") approval pursuant to 49 U.S.C. §§ 11343 and 11344 before it could effectuate that control. CSX obtained the requisite authority from the ICC in 1980 to merge the Chessie and SCLI into itself and to control their subsidiary railroads which would continue as separate corporate entities. *CSX Corporation—Control—Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, 363 I.C.C. 521 (1980). The exercise of the authority granted CSX by the Commission was conditioned upon CSX acceptance of the so-called *New York Dock* conditions as required by 49 U.S.C. § 11347 for the protection of employees who might be affected as a result of the ICC order. *See New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979). Shortly after the Commission issued its decision and order, CSX exercised the authority granted, merged Chessie and SCLI into itself and assumed control of C&O and SCL.

A. The *New York Dock* Conditions

The *New York Dock* conditions provide compensatory protection for employees dismissed, displaced or transferred as a result of an ICC order approving a merger or control application. They are the minimum protective

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[1] Subsequent to the institution of this action, CSX caused the merger of SCL and C&O and these railroads became CSXT.

conditions required by 49 U.S.C. § 11347 in merger and control cases. *New York Dock Railway-Control-Brooklyn Eastern District Terminal*, 360 I.C.C. 60 (1979). Article I, section 4(a) of the conditions also requires that before a carrier can institute a change resulting from the merger or control which may cause rearrangement of employee forces, it must provide the employees with a 90-day written notice which "shall contain a full and adequate statement of the proposed changes to be affected [sic] by such transaction, including an estimate of the number of employees of each class affected by the intended changes." *Id.* at 85. The same paragraph of the conditions provides for the negotiation of a so-called implementing agreement "with respect to application of the terms and conditions of [*New York Dock*] . . . [and] shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary" by the proposed change. *Id.* Should negotiations be unsuccessful, provision is made for arbitration and finally section 4(b) provides that "No change in operations, services, facilities or equipment shall occur until after an agreement is reached or the decision of a referee has been rendered." *Id.*

Section 2 of Article I prohibits changes in "rates of pay, rules, working conditions or other rights, privileges or benefits . . . under applicable laws and/or existing collective bargaining agreements or otherwise . . . unless changed by future collective bargaining or applicable statutes" and Section 3 prohibits the deprivation of any rights or benefits . . . which [employees] may have under any existing job security or other protective conditions or arrangements." *Id.* at 84.

The language of sections 2 and 3 is identical to that contained in conditions established by the Secretary of Labor under 45 U.S.C. § 565(b) because 49 U.S.C. § 11347 mandates such provisions be imposed to protect

employees affected by ICC approval of transactions described in 49 U.S.C. § 11343(a).

B. The Proposed Changes

On August 29, 1986, CSXT served a notice of proposed change under Article I, Section 4 of the *New York Dock* conditions stating its intent to close the SCL heavy repair shop at Waycross, Georgia and transfer the work and certain positions to the C&O heavy repair shop at Raceland, Kentucky. Appendix A at 3a. The notice stated that 149 positions would be abolished on the SCL at Waycross, of which 121 were occupied by employees represented by petitioner and 107 positions would be created on the C&O at Raceland, of which 99 would be represented by petitioner. *Id.*

Attempts to reach an agreement on the transfer proved fruitless. Petitioner, relying upon an earlier employee protective agreement [2], originally sought to arbitrate the right of CSX to move work from one of its railroads (SCL) to another (C&O) and whether it could do so in light of the restrictions contained in that separate agreement which, BRC asserted, prohibited the transfer of SCL work and employees beyond SCL property. Appendix G at 68a. CSX, however, insisted upon arbitration only under Article I, Section 4 by which an agreement submitted by it would be imposed on affected employees as the arbitrated implementing agreement. *Id.* at 71a. Petitioner opposed such an arbitration. *Id.* at 73a, 77a-78a. CSX then sought and obtained appointment of an arbitrator by the National Mediation Board under section 4(a)(1) of the *New York Dock conditions.* 360 I.C.C. at 85. The hearing before the arbitrator took place on December 18, 1986. Appendix A at 5a.

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[2] The earlier protective agreement known as the "Orange Book" because of the color of its cover, was entered into in 1966 to protect employees affected by the merger of the Atlantic Coast Line and Seaboard Coast Line railroads to form the SCL.

C. Court Proceedings

On December 17, 1986, petitioner filed an action for declaratory judgment and injunctive relief, contending that the transfer of work and employees from the SCL railroad to the C&O railroad effected a unilateral modification of existing rules and working conditions of SCL employees at Waycross in violation of sections 2 Seventh and 6 of the Railway Labor Act, 45 U.S.C. §§ 152 Seventh and 156.[3] The proposed transfers effected changes in the provisions of the collective bargaining agreements and in the provisions of the separate "Orange Book" protection agreement which restricts transfers of work and provides the employees covered thereby with lifetime employment. (Appendix A at 5a; Note 2, *supra.*)

The District Court stated the issue presented by the complaint as follows:

> The case presents the federal question of whether CSX's proposed transfer of the employees and work at the Waycross repair shop to Raceland, Kentucky, constitutes a violation of the Railway Labor Act, 45

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[3] While correctly describing the nature of petitioner's complaint at paragraph 5 of its opinion (Appendix A at 4a) as a suit to enjoin the proposed transfer as "a unilateral modification of existing rules and working conditions in violation of the Railway Labor Act . . ., 45 U.S.C. §§ 152 Seventh and 156", the Eleventh Circuit misconstrues the nature of petitioner's cause at the outset of its opinion (Appendix A at 2a) and as a material basis for its ruling in this case (Appendix A at 8a) when it describes petitioner's cause as one to review the award of an arbitrator. Notwithstanding the court's description of petitioner's cause of action, this case is not an attempt to review and set aside an arbitration award. The arbitration award referred to by the court was not in existence when petitioner's complaint was filed (See Appendix A at 4a-5a). Moreover, that award is the subject of a separate proceeding before the United States Court of Appeals for the District of Columbia Circuit (*Brotherhood of Railway Carmen, Division of TCU* v. *I.C.C. et al.*, No. 88-1724) having been transferred to that court by the Eleventh Circuit after it granted a change of venue motion filed by CSXT, *inter alia.*

> U.S.C. §§ 152, First and Seventh and 156; or whether the proposed transaction is exempt from the application of the RLA due to the ICC's exercise of its exemption authority under the Interstate Commerce Act, 49 U.S.C. § 11341(a).

Appendix A at 8a; Appendix B at 17a.

The District Court held it had jurisdiction under 28 U.S.C. §§ 1331 and 1337 to consider petitioner's complaint under 45 U.S.C. §§ 152 First, 152 Seventh and 156, and 49 U.S.C. § 11341 (Appendix B at 17a), but concluded that the authority provided the Commission by section 11341(a) superceded the Railway Labor Act and contract rights of the affected employees. *Id.* at 21a.

On appeal, the Court below in a *per curiam* opinion did not reach the issue of preemption because it:

> . . . [A]gree[d] with CSX that this action is an attempt by [petitioner] to bypass the appropriate procedures for review of the arbitration award. . . . We agree with CSX that the present lawsuit is, in effect, a collateral attack on the arbitration award; it is an attempt by [petitioner] to have the district court set aside the arbitration award, rather than going through the normal channels of appeal to the ICC and then to the Court of Appeals.[4]

Appendix A at 8a.

Petitioner had contended that no collateral attack on the 1980 ICC order could be substantiated in this case because only the courts, not the Commission, have authority to determine the effect of ICC orders on other laws such as the RLA. To that contention, the Court responded:

> While we recognize that the "collateral attack" analogy is not perfect, we find it instructive; . . .

Id. at 9a. The Court then concluded "that subject matter jurisdiction [being] absent, [it] need not reach the

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[4] See footnote 3, *supra.*

merits." *Id.* at 10a. The Court vacated the order of the district court and remanded the case with instructions to dismiss for lack of jurisdiction.

The Commission in the meantime, having reviewed the arbitration award on the appeal of CSXT and the later cross-appeal of petitioner, held the arbitrator to have been correct in ruling the Commission's authority superceded employees' rights under the RLA and their collective bargaining agreements; but reversed the arbitrator's ruling upholding certain of the employees' rights contained in the "Orange Book" because the ICC disagreed with the factual finding of the arbitrator that upholding those employee rights would only "slightly impair" the carrying out of the transaction. (Appendix C at 35a-36a.) That decision of the ICC is the subject of a petition for review to the United States Court of Appeals for the District of Columbia Circuit. *See* note 3, *supra.*

REASONS FOR GRANTING THE WRIT

This Case Presents Important Issues Of Federal Law That Have Been Decided In A Manner Which Conflicts With Applicable Decisions Of This Court, Other Courts Of Appeals And With The Intent Of Congress. Moreover, Those Issues Have Been Decided In A Manner That Needlessly Creates A Conflict Between Two Acts Of Congress Regulating The Rail Industry Which Has Caused And Will Continue To Cause Serious, Worsening Labor-Management Strife Throughout The Industry.

I. This Case Presents Issues Of Importance To The Rail Industry And To The Process Of Administrative Law That Need To Be Resolved By This Court.

The policy of Congress for the governance and regulation of interstate commerce by rail carriers is found principally in two statutes, the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.* (hereinafter, "ICA") and the Railway Labor Act, 45 U.S.C. § 151, *et seq.* (hereinafter, "RLA"). These Acts govern two basic but discrete as-

pects of rail transportation. The ICA expresses the Congress' basic rail transportation policy and the RLA, its basic rail labor policy; the goal of each being to maintain insofar as possible, uninterrupted rail transportation service throughout the nation. *Texas and New Orleans R. Co., et al. v. Brotherhood of Ry. and Steamship Clerks, et al.* 281 U.S. 548, 564 (1930).

For some sixty-two (62) years the RLA and ICA have existed side-by-side and not once during the first fifty-seven (57) years of their co-existence did the courts or the ICC conclude that there was in fact any irreconcilable conflict between them. *Compare Chicago, St. Paul M&O-Lease*, 295 I.C.C. 696, 701-02 (1958), *with Southern Ry.-Control*, 331 I.C.C. 151, 169-71 (1967). However, in 1982, the Commission began to redefine its role under the Interstate Commerce Act and became an active, innovative partner in the rehabilitation and future course of the rail industry. Whereas throughout its history the Commission had maintained it could not intrude itself into labor relations in the rail industry,[5] in 1982 it began to demonstrate an active leadership role in directing the future course of that industry. *See Knox & Kane R. Co.—Gettysburg R.—Petition for Exemption*, 366 I.C.C. 439 (1982), in which the Commission laid the foundation for its creation of the short line phenomenon by eliminating employee protective conditions in line sales. In 1983 it broke with its earlier contrary decisions and, without citing them, held that its approval of a trackage rights agreement between railroads carried with it approval of

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[5] See testimony of ICC Commissioner Joseph B. Eastman at the hearing held on the 1940 amendments to ICA in which he answered the concerns of some Senators that the ICC might become involved in rail labor relations as a result of enactment of section 5(2)(f) (now 49 U.S.C. § 11347). Hearings on H.R. 7650 Before House Committee on Interstate and Foreign Commerce, 73rd Cong., 2d Sess. at 54 (1934). Commissioner Eastman said:

> . . . [ICC has] no jurisdiction over labor matters at all and never [has] had.

all material terms set forth in the application, including those which governed the employment of crews to man the trains. It relied on 49 U.S.C. § 11341(a) to relieve the carriers involved from their obligations under the RLA regarding such employment of crews. *See* ICC Decision in *Missouri-Kansas-Texas Railroad Company—Trackage Rights—Missouri Pacific Railroad Company*, Finance Docket No. 30,000 (Sub No. 25), decided October 19, 1983 (unpublished) and cited in the ICC's Petition For A Writ of Certiorari to the United States Court of Appeals For The District of Columbia Circuit, Sup. Ct. No. 85-792 at Appendix G (p. 55a) (1982).[6] The ICC then advanced its authority a bit further and held that its formal approval of a transaction extended to all matters the applicant carrier brought to its attention during the course of a proceeding. ICC Finance Docket No. 30800, *Union Pacific Corp.—Control*, at 82, served May 19, 1988; *see also*, Appendix C at 35a-36a. Finally, in 1985 the Commission took the ultimate position on its authority and has since been implementing that position. In *Maine Central R.R. Co., et al.-Exemption from 49 U.S.C. 11342* and *11343*, ICC Finance Docket No. 30532 (1985), *aff'd sub nom. RLEA v. ICC*, 812 F.2d 1443 (D.C. Cir. 1987) (Table), the Commission held:

> It is that [Commission] order, not RLA [Railway Labor Act] or WJPA [Washington Agreement for protection of employees], that is to govern employee-

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[6] *Contra, Illinois Central Gulf R.R.—Trackage Rights—C&IM, ICC* Finance Docket No. 28046 (1970), in which the ICC refused the carrier's request to impose the crew manning terms contained in an ICC-approved trackage rights agreement and said:

> . . . [T]he Commission's subject matter jurisdiction was solely over matters affecting transportation services and [that the I.C.C. could] determine only that this provision and other provisions in the agreement would have no adverse transportation effects; that as to all other subject matters, including matters relating to labor relations as may fall within the purview of the Railway Labor Act the [Commission] decline[s] jurisdiction over such questions.

management relations in connection with the approved transaction.[7]

During the three-year period since its decision in the *Maine Central* case, the Commission has proceeded to extend its immunizing authority under section 11341(a) to any activity the carrier wishes to undertake following a merger regardless of whether the ICC has statutory authority to approve such activity; whether such activity was ever made known to the Commission during the pendency of the merger or control proceeding; or, whether the statutory transaction approved by the ICC had been consummated many years before the particular activity was contemplated. *CSX Corporation—Control—Chessie System, Inc.*, ICC Finance Docket No. 21215 (Sub-No. 4) (decided June 8, 1988), *appeal pending, BRC v. ICC et al.*, D.C. Cir No. 88-1724 (a copy of the Commission's decision is attached as Appendix C at 23a to 46a.). The railroads have been using ICC approval orders to rid themselves of collective bargaining obligations rather than attempting to bargain for the elimination or modification of such obligations as required by the Railway Labor Act. *See, Arbitration Between BLE and Union Pacific R.R. and Missouri Pacific R.R.*, ICC Finance Docket No. 30,000 decided January 17, 1985 (Seidenberg, Neutral) (a copy of that decision is attached hereto as Appendix F at pages 57a-67a). Moreover, relying upon the collateral attack rule expressed in *Venner v. Michigan Central R.R.*, 271 U.S. 127, 130 (1926), and their belief that the ICC has been given exclusive jurisdiction over labor disputes arising from ICC regulated transactions, the railroads have argued, often successfully as in the instant case, that rail labor may not ask the federal courts to enforce the Railway Labor Act.

Even though the impact of ICC orders on rail employees' substantive and enforcement rights under both the

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[7] See footnote 6, *supra*.

Railway Labor Act and their collective bargaining agreements has been a frequent subject of litigation between rail labor and management during the past five years, that question is still in dispute. *Compare, BLE v. B&M*, 788 F.2d 794 (1st Cir.), *cert. denied*, 107 S.Ct. 111 (1986), *with RLEA v. Pittsburgh & Lake Erie R.R.*, 845 F.2d 420 (3rd Cir. 1988), *cert. granted*, 57 U.S.L.W. 3370 (November 28, 1988). Indeed, it is not even settled today whether rail labor can invoke the aid of the federal courts to determine whether the Railway Labor Act is, or is not, superceded, for the lower courts are divided on whether such a suit is a collateral attack on the ICC's order authorizing or exempting the financial transactions. *Compare, BLE v. B&M, supra*, 788 F.2d at 801, *and UTU v. Burlington Northern R.R.*, 672 F.Supp. 1579 (D. Mont. 1987), *appeal pending*, 9th Cir. No. 87-4386, *with RLEA v. Pittsburgh & Lake Erie R.R., supra*, and *Burlington Northern v. UTU et al.*, 7th Cir. No. 88-2180, decided November 18, 1988.

Petitioner respectfully submits that it is crucial to the stability of the rail industry today that this Court settle the current dispute over the relationship between the transportation and labor statutes. As may be expected, the abrogation of contractual and statutory rights has severely strained labor relations in the rail industry, and when coupled with the lack of any meaningful forum to enforce existing rights, has forced rail labor to exercise its economic powers to enforce those rights. To date, there have been two strikes and the threat of five other strikes because of the carriers' belief that the Interstate Commerce Act relieves them of their Railway Labor Act and contractual obligations. *See*, Petition for Certiorari in Supreme Court No. 87-1911, at 17. Because the underlying dispute between the parties is essentially a legal one, a negotiated resolution is difficult and, thus, any one of those strikes may lead to a nation-wide curtailment of rail service. *See, Burlington Northern R.R. v. BMWE*, 481 U.S. ——, 95 L. Ed.2d 381 (1987).

Since the frequency of the carriers' use of the ICC's putative powers has increased in the past year, the rail industry does not have the time to see if the lower appellate courts can reconcile the widely divergent views on this issue. More important, however, such a reconciliation is unlikely because, when examined closely, the Eleventh Circuit's approach is contrary to the Interstate Commerce Act,[8] to prior decisions by this Court,[9] and to earlier decisions by the appellate courts,[10] wherein the courts and the ICC all have acknowledged that it is the tribunal called upon to enforce the law which the carrier contends has been affected by 49 U.S.C. § 11341(a), which is to determine if the carrier is correct in its contention.

In view of the extreme importance of these issues to the orderly administration of the Railway Labor Act and the Interstate Commerce Act, petitioner respectfully submits that this Court should conclude what it attempted to do two years ago when it granted certiorari in *ICC v. BLE* and determine whether there is in fact a conflict between the two Acts of Congress, and if so, which statute under what circumstances prevails.

II. The Decision Below Was Decided In A Way That Conflicts With Applicable Decisions Of This Court.

In concluding that the district court lacked jurisdiction to consider petitioner's complaint to enforce the Railway Labor Act, the Eleventh Circuit found that it was "in effect a collateral attack on the arbitration

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[8] See brief of ICC to this Court in *ICC v. BLE*, Sup. Ct. No. 85-792 pages 18-20: "Congress gave the Commission authority to examine, condition, and approve transactions. The immunization is a statutory consequence of Commission approval."

[9] *Schwabacher v. United States*, 334 U.S. 182 (1948); *Seaboard Air Line R.R. v. Daniel*, 333 U.S. 118 (1948).

[10] *Brotherhood of Locomotive Engineers et al. v. Chicago and North Western Ry. Co.*, 314 F.2d 424, 428 (8th Cir. 1963); *Texas & N.O.R.R. Co. v. Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962).

award" which is "an extension of the authority of the ICC". Appendix A at 8a.[11] That determination gives to the ICC, not the federal courts, the exclusive jurisdiction to determine exactly how rail labor's rights will be protected in this case. That approach to the relationship between the Interstate Commerce Act and the Railway Labor Act, petitioner submits, is contrary to prior decisions of this Court which have emphasized that the Commission does not have jurisdiction to enforce laws other than the Interstate Commerce Act, and that it is the tribunal called upon to enforce that "other law" that is to determine the impact of the ICC's order on the rights protected by the "other law". *E.g. Seaboard Air Line R.R. v. Daniel*, 333 U.S. 118, 122-23 (1948); *McLean Trucking Co. v. United States*, 321 U.S. 67, 79-80 (1944); *see also, ICC v. BLE, supra*, 96 L. Ed.2d at 247 n.13 (Stevens, J. concurring).

In *McLean Trucking*, this Court addressed the relationship between the Commission's obligation to consider the policies of overlapping, non-transportation laws and the enforcement of those laws. In that case, which involved the anti-trust laws, this Court stated (321 U.S. at 79-80):

> . . . Congress has vested expert administrative bodies such as the Interstate Commerce Commission with broad discretion and has charged them with the duty to execute stated and specific statutory policies. That delegation does not necessarily include either the duty or the authority to execute numerous other laws. . . .
>
> But in executing those policies the Commission may be faced with overlapping and at times inconsistent policies embodied in other legislation enacted at different times and with different problems in view. When this is true, it cannot, without more, ignore the latter. The precise adjustments which it

[11] See note 3, *supra*.

> must make, however, will vary from instance to instance depending on the extent to which Congress indicates a desire to have those policies leavened or implemented in the enforcement of the various specific provisions of the legislation with which the Commission is primarily and directly concerned. . . .

McLean Trucking's teachings were amplified in *Seaboard* when this Court raised *sua sponte* the question of whether a State court called upon to decide the impact of an ICC order on a State law had jurisdiction to entertain that suit, or did the federal courts which had jurisdiction to review the ICC order have exclusive jurisdiction over that question. 333 U.S. at 122. This Court concluded that the State court had jurisdiction. In reaching that conclusion, this Court stated (333 U.S. at 123):

> [T]he state court . . . had power, because of the issues raised by the complaint and because of the relief requested, to determine whether the order, properly interpreted, did exempt [the railroad] . . . from compliance with the state railroad corporation laws and, if so, whether the Commission had transcended its statutory authority in making the order.

When these principles are applied to this case, it becomes clear that the ICC, in discharging its duties under the Interstate Commerce Act, has to consider the impact of its orders on rail labor's rights under other laws, such as the Railway Labor Act. Petitioner fully recognizes that the question of whether the ICC has discharged that responsibility is reviewable solely in the courts of appeals under 28 U.S.C. §§ 2321(a) and 2341, *et seq.* However, that question is separate and distinct from the issues of whether the ICC's order supercedes the Railway Labor Act and existing collective bargaining agreements, and whether those non-ICC related rights are enforceable. Those questions, according to *Seaboard* and to four Justices of this Court in *ICC v. BLE*, are to be decided by the "tribunal that is faced with a claim that a party is violating" the non-transportation statute. *ICC v. BLE*,

supra, 96 L. Ed.2d at 247 n.13; *see also, BLE v. Chicago & North Western Ry., supra* note 10, 314 F.2d at 428.

In this case, the Circuit Court's refusal to permit the district court to accept jurisdiction over rail labor's complaint was grounded on the assumption that the ICC had the responsibility to enforce the public policies behind the Railway Labor Act in transactions over which the ICA gave it jurisdiction. Appendix A at 8a-9a. But such an assumption is contrary to this Court's holding in *McLean Trucking* and, in light of the ICC's explicitly limited role over labor issues, effectively means that those national rail labor policies are being ignored.

The Eleventh Circuit did not expressly address the issue of the effect of 49 U.S.C. § 11341(a) upon the authority of the ICC in this proceeding but that provision lies at the base of its holding that a suit to enforce the Railway Labor Act rights of employees constitutes a collateral attack either upon an eight-year old fully consummated merger and control order of the Commission or upon an arbitration award entered into under employee protective conditions imposed by that 1980 order.

The case law applying 49 U.S.C. § 11341(a) has become confused and confusing. In *ICC v. BLE, supra*, 96 L. Ed.2d at 247 n.13, the four Justices of this Court, in concurring in the remand of the case, provided a specific indication of the effect of that provision when they stated that the exemption authority conferred upon the ICC by 49 U.S.C. § 11341(a) was self-executing and its "necessity" in a given set of circumstances was to be determined by the "tribunal that is faced with a claim that a party is violating some 'other law'." The guidance provided by the concurring justices in that case, however, has been largely ignored by the ICC. Although the Commission itself argued to this Court in *ICC v. BLE, supra*, that section 11341(a) was self-executing, it now determines in individual cases that exemption from the Rail-

way Labor Act and collective bargaining agreements are "necessary" to "carry out" or "carry into effect" orders approving mergers and other forms of financial consolidations authorized under the Interstate Commerce Act. *See e.g.*, Appendix C at 35a-36a.

The Courts of Appeals which have held that rail labor's efforts to enforce its Railway Labor Act rights constitute collateral attacks upon ICC orders either refuse to address the "necessity" issue as occurred in this case and in *UTU v. Norfolk & Western Ry.*, 822 F.2d 1114 (D.C. Cir. 1987), *cert. denied*, 108 S.Ct. 700 (1988), or hold impliedly at least, that the exemption authority conferred by section 11341(a) is "necessary" to the "carrying into effect" or the "carrying out" of the ICC order, though that order, as in the instant case, may have been fully consummated in all its terms some six years prior to the acts complained of. *See, BLE v. Boston & Maine Corp., supra*, 788 F.2d at 801-02.

The employees in the railroad industry face a Commission which has concluded the section 11341(a) exemption is automatically "necessary" to implement any operational, service or facility change made feasible by an order of approval issued pursuant to 49 U.S.C. §§ 11343 and 11344, (Appendix C at 35a-36a) as well as a growing number of courts of appeals and district courts which just as automatically conclude that actions to enforce Railway Labor Act rights are collateral attacks on ICC orders without determining whether the "necessity" criterion of section 11341(a) has been met. However, the "necessity" component is an essential element of the statute's immunity provision. To prevent the judicial repeal of this essential constituent part of an Act of Congress, it is necessary that this Court review this case and address the impact of the Interstate Commerce Act and section 11341(a) both upon the jurisdiction of federal courts to enforce the Railway Labor Act, and on that labor statute itself. Inextricably meshed with that issue is the question of the affect of 49 U.S.C. § 11347, which

requires the preservation of the very rights, which according to the Commission, section 11341(a) supercedes. When Congress amended section 11347 in 1976, to require the ICC to preserve the collective bargaining agreement and other rights of employees, it did not then or later amend the exemption authority of the Commission which had existed for many years as contained in section 11341(a); nor did it condition its command to preserve employee rights upon the application of section 11341(a) to those rights. It would seem reasonable to conclude that since every order issued under 49 U.S.C. §§ 11343 and 11344 must contain a section 11347 condition preserving employee collective bargaining agreement and other rights, such a condition could not be considered as impairing the "carrying out" of the very transaction to which Congress required it be attached.

CONCLUSION

For the reasons set forth herein, petitioner respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit to review its judgment in *BRC v. CSXT*, *supra*.

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Date: December 19, 1988

Supreme Court, U.S.
FILED
DEC 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

88 No. 1014

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

BROTHERHOOD OF RAILWAY CARMEN,
DIVISION OF TRANSPORTATION•COMMUNICATIONS
INTERNATIONAL UNION,
Petitioner,

v.

CSX TRANSPORTATION, INC.,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 87-8466

BROTHERHOOD RAILWAY CARMEN, DIVISION OF TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION (TCU),
Plaintiff-Appellant,

v.

CSX TRANSPORTATION, INC.,
Defendant-Appellee.

Sept. 19, 1988

Appeal from the United States District Court
for the Southern District of Georgia

William G. Mahoney, William J. Birney, Highsaw & Mahoney, Washington, D.C., for plaintiff-appellant.

Malcolm R. Maclean, Hunter, Maclean, Exley & Dunn, Savannah, Ga., James S. Whitehead, Sidley & Austin, Chicago, Ill., for defendant-appellee.

Before HILL and EDMONDSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

PER CURIAM:

Plaintiff-appellant Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees ("BRAC") commenced this lawsuit in federal district court seeking to enjoin defendant-appellee CSX Transportation, Inc. ("CSX"), a subsidiary of CSX Corporation, from implementing an arbitration award issued under procedures established by the Interstate Commerce Commission ("ICC").[1] The district court denied BRAC's motion for a preliminary injunction and cross-motion for partial summary judgment, it granted CSX's motion to dismiss or, in the alternative, for summary judgment. BRAC appeals from that order. We conclude that the district court lacked subject matter jurisdiction; we therefore vacate the order of the district court and remand with instructions that the case be dismissed for lack of subject matter jurisdiction.

The district court found the following to be the facts of the case:

> 1. The Interstate Commerce Commission, by order of September 23, 1980, approved an application of the CSX Corporation to acquire control of the railroad subsidiaries of Chessie System, Inc. ("Chessie"), and Seaboard Coast Line Industries, Inc. ("SCLI"). As a result of this transaction, CSX was the surviving partner of a merger between Chessie and SCLI. Chessie, until that time, had controlled the Chesapeake and Ohio Railway Company ("C & O"), which operated a heavy freight car repair shop at Raceland, Kentucky. At that time, SCLI controlled the Seaboard Coast Line Railway Company ("Seaboard"), which then operated its heavy freight car

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[1] In order to avoid potential confusion, we wish to clarify that, consistent with the district court's order, we refer to the subsidiary corporation, CSX Transportation, Inc. as "CSX" rather than as "CSXT" as it was referred to by the parties in brief and at oral argument.

repair shop at Waycross, Georgia. The ICC authorized Chessie and SCLI to merge into CSX, while their individual railroad subsidiaries, such as C & O and Seaboard, were to remain separate corporate entities. In order to protect carrier employees affected by the consolidation, "as well as those who may be affected in the future, but are not now identified specifically," the ICC imposed the so-called *"New York Dock"* conditions. Employees affected by actions of their employer taken pursuant to the ICC's authorization are entitled to the protections embodied in the *New York Dock conditions. CSX [Corporation] —Control—Chessie [System, Inc.,] and Seaboard [Coast Line Industries, Inc.]*, 368 I.C.C. 521 (1980); *see also New York Dock Ry. v. U.S.*, 609 F.2d 83 (2d Cir.1979).

2. Article I, Section 4(a) of the *New York Dock* conditions provides that a carrier proposing to take an action pursuant to the ICC's authorization that may cause the dismissal or displacement of its employees must give its employees at least 90 days written notice. If the parties are unable to reach agreement on the implementation of the proposed action, either party may submit the dispute to binding arbitration before a neutral referee.

3. On August 29, 1986, CSX served a formal notice under Article I, Section 4 of the *New York Dock* conditions that it intended to close the Waycross heavy repair shop and transfer the employees and the work that otherwise would be performed there to the [C & O] heavy repair shop in Raceland, Kentucky. The notice stated that 149 job positions at Waycross would be abolished (121 occupied by BRAC members) and that 107 new job positions would be created at Raceland (99 in crafts represented by BRAC) to perform the work that would be transferred from Waycross. Thus, the notice in-

formed BRAC that the Waycross shop would be closed and that, by January of 1987, 22 BRAC-represented jobs would be lost.

4. After attempts to negotiate an implementing agreement on the transfer were unsuccessful, BRAC requested on October 10, 1986 that the dispute be referred to binding arbitration under the *New York Dock* conditions, as well as under a provision of a collective bargaining agreement governing Seaboard employees who were employed in 1967. That agreement, due to the color of its cover, is known as the "Orange Book" agreement. On October 15, 1986, CSX also called for arbitration under the *New York Dock* conditions. BRAC later challenged the applicability of the *New York Dock* conditions, contending in a letter of November 2, 1986, that the closing of the Waycross shop and the transfer to Raceland had not been authorized by the ICC in the *CSX—Control* case and, therefore, were not subject to compulsory arbitration under the *New York Dock* conditions.

5. On December 17, 1986, BRAC filed this action for declaratory judgment and injunctive relief, alleging that the closing of the Waycross shop and transfer of the work to Raceland, Kentucky, constituted a unilateral modification of existing rules and working conditions in violation of the Railway Labor Act ("RLA"), 45 U.S.C. §§ 152 Seventh and 156. BRAC also sought a declaratory judgment that CSX's attempt to effectuate the transfer through compulsory arbitration violated the arbitration procedures set forth in § 157 First of the RLA. Finally, BRAC sought preliminary and permanent injunctive relief to protect employees from harm pending exhaustion of the mandatory notice, negotiation and mediation procedures of the RLA. 45 U.S.C. § 155-157, 160.

6. On December 18, 1986, a hearing was held before the arbitration committee pursuant to the *New York Dock* conditions. CSX and BRAC addressed a variety of issues to the committee, including: whether the transfer could be undertaken pursuant to the ICC's authorization; whether CSX had given BRAC sufficient notice of the transfer; whether the Seaboard employees protected by the "Orange Book" could be transferred off of Seaboard property in alleged derogation of that agreement; whether the work covered by the Seaboard collective bargaining agreement could be made subject to a C & O agreement; and what the ultimate terms of an implementing agreement should be.

7. On December 26, 1986, CSX posted a notice that the jobs of 21 employees at the heavy repair shop in Waycross would be abolished effective January 2, 1987, and BRAC sought a temporary restraining order ("TRO") in this Court to enjoin the proposed job abolishments. The Court denied BRAC's request for a TRO following a hearing on December 31, 1986, and scheduled a hearing on BRAC's motion for a preliminary injunction on January 9, 1987.

8. At the hearing on January 9, 1987, CSX presented evidence that the furloughs of January 2, 1987, were not caused by the impending shop transfer but, rather, were a result of a decline in the amount of available work scheduled for Waycross in 1987. BRAC showed that CSX failed to provide specific information in August of 1986 as to the nature of the work that was intended to be transferred to Raceland. Representatives of CSX testified that the decision to close the Waycross shop was made pursuant to a variety of considerations, including the following: that CSX's freight car repair costs are too high; that CSX has an overcapacity of repair facilities; and that the Raceland shop has superior

technical and commercial potential. The testimony also showed that the repair work projected as available for Waycross in 1987 would have necessitated a reduction in force regardless of the plan to transfer the work to Raceland. Although evidence demonstrated that CSX had dismantled much of the Waycross shop's machinery and office materials and loaded them onto railroad cars during December of 1986, CSX stated that it would not implement the transfer until it received a favorable decision from the arbitration committee granting CSX permission to implement the transfer. The evidence further demonstrated that some Waycross equipment had already been reassembled and put back into place and that a program of repair work to be performed in Waycross had begun. Finally, BRAC admitted that, if the arbitration committee rendered a decision favorable to BRAC, the need for a preliminary injunction would evaporate.

9. On March 23, 1987, the neutral member of the arbitration committee issued his decision, with both the union and the carrier representatives dissenting. The arbitrator found that, because the shop transfer was necessary to allow CSX to carry out the ICC-approved merger, it was exempt from the RLA. However, on finding that the transfer of the Orange Book employees was not necessary to the consummation of the merger, the arbitrator ruled the Orange Book-protected employees could not be compelled to accept positions in Raceland. CSX appealed this decision to the ICC on April 13, 1987; BRAC filed a cross-appeal on May 26, 1987.

10. On May 8, 1987, CSX filed a motion to dismiss or, in the alternative, for summary judgment addressing the merits of BRAC's complaint before this Court. After securing an enlargement of time in which to respond, BRAC responded to CSX's motion

and cross-moved for partial summary judgment on June 9, 1987.

11. BRAC came before the Court once again on June 1, 1987, seeking a TRO to enjoin the shop transfer. This time BRAC contended that, if the transfer were to be implemented while the appeal of the arbitrator's decision to the ICC was still pending, those Orange Book employees who elected to stay in Waycross would run the risk of losing the present opportunity to bid on jobs in Raceland. Although the arbitrator held that Orange Book employees could not be compelled to move to Raceland, CSX's appeal of that decision presented the risk that the ICC would hold the reverse to be true. Such a situation would force Orange Book employees to face a dilemma: if they elected to stay in Waycross, they would be taking the chance that the ICC would later rule they could be moved to Raceland at a time when the bidding on Raceland jobs was over and the jobs filled by other workers. At a hearing before the Court on June 2, 1987, CSX stated that it would hold open positions in Raceland for any Orange Book-protected employees who might later desire to bid on Raceland jobs in the event that the arbitrator's decision is reversed. The Court granted BRAC's request for a TRO for a period of 10 days to preserve the status quo pending disposition of the various motions.

District Court order of June 16, 1987, at 2-8, 662 F.Supp. 1409 (S.D.Ga.1987). The parties' appeal and cross-appeal to the ICC from the arbitration decision were decided by the ICC shortly before this case was orally argued in this court, although the decision was not served until after oral argument. *CSX Corporation—Control—Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, — I.C.C.2d —, Finance Docket No. 28905 (Sub-No. 22) and Finance Docket No. 21215 (Sub-No. 4) (decided June 8, 1988; served June 23, 1988).

While we do not dispute the district court's findings of fact, we must disagree with that court's conclusion that it had subject matter jurisdiction of this case. The district court found that it had jurisdiction under 28 U.S.C. §§ 1331 and 1337(a), 45 U.S.C. §§ 152 First, 152 Seventh, and 156, and 49 U.S.C. § 11341, having concluded that

> [t]he case presents the federal question of whether CSX's proposed transfer of the employees and work at the Waycross repair shop to Raceland, Kentucky, constitutes a violation of the Railway Labor Act, 45 U.S.C. §§ 152, First and Seventh, and 156; or whether the proposed transaction is exempt from the application of the RLA due to the ICC's exercise of its exemption power under the Interstate Commerce Act, 49 U.S.C. § 11341(a).

District Court Order of June 16, 1987, at 8. However, we agree with CSX that this action is an attempt by BRAC to bypass the appropriate procedures for review of the arbitration award. Congress has provided for exclusive jurisdiction in the Court of Appeals to review actions by the ICC. 28 U.S.C. §§ 2321(a), 2342(5). The arbitration opinion and award recognizes that it is authoritative only as an extension of the authority of the ICC. R.2-22-App. A, at 31. We agree with CSX that the present lawsuit is, in effect, a collateral attack on the arbitration award; it is an attempt by BRAC to have the district court set aside the arbitration award, rather than going through the normal channels of appeal to the ICC and then to the Court of Appeals. Based upon the exclusive jurisdictional grant to the Court of Appeals by Congress, we conclude that the district court lacks subject matter jurisdiction of this action.

Our decision does not totally preclude judicial review of this matter since, as noted above, the decision of the ICC is subject to direct review in the Court of Appeals. We believe our resolution of the case is consistent with

the apparent intent of Congress in enacting the jurisdictional statutes providing for review of ICC decisions, and we note that our conclusion is in accord with the decision in *United Transportation Union v. Norfolk and Western Railway Co.*, 822 F.2d 1114 (D.C. Cir. 1987), *cert. denied*, —— U.S. ——, 108 S.Ct. 700, 98 L.Ed.2d 651 (1988). *But see Railway Labor Executives Association et al. v. City of Galveston*, 849 F.2d 145 (5th Cir. 1988).

BRAC argues that the ICC is required by 49 U.S.C. § 11347 to protect employees' existing collective bargaining rights, and that the ICC lacks the authority to determine the effect of its orders upon other laws. While these considerations may be relevant to the merits of the ultimate decision, they are not dispositive of the question whether the district court had subject matter jurisdiction of the case.

BRAC points us to the decision in *City of Palestine, Texas v. United States*, 559 F.2d 408 (5th Cir. 1977), *cert. denied sub nom. Missouri Pacific Railroad Company v. City of Palestine, Texas*, 435 U.S. 950, 98 S.Ct. 1576, 55 L.Ed.2d 800 (1978) and to Justice Stevens' concurrence in *Interstate Commerce Commission v. Brotherhood of Locomotive Engineers*, —— U.S. ——, 107 S.Ct. 2360, 2370, 96 L.Ed.2d 222 (1987), as further support for the proposition that there are limits on the ICC's power. However, the subject matter jurisdiction of the district court was not at issue in those cases, so we do not find them to be dispositive of the issue presently before us.

BRAC also argues that the present action cannot be viewed as a collateral attack on the arbitration award because the ICC lacks the district court's authority to determine the effect of its orders on other laws, such as the RLA. While we recognize that the "collateral attack" analogy is not perfect, we find it instructive; furthermore, since the parties already have invoked the "direct

appeal" procedure, we find no injustice or inefficiency in leaving the resolution of the decision in that forum. If anything, precluding the "collateral attack" will lead to a more efficient resolution of cases like this one, by eliminating duplication of effort.

As we conclude that subject matter jurisdiction is absent, we need not reach the merits.

The order of the district court is VACATED and the case is REMANDED to the district court with instructions to dismiss for lack of subject matter jurisdiction.

APPENDIX B

UNITED STATES DISTRICT COURT
S.D. GEORGIA
BRUNSWICK DIVISION

Civ. A. No. 286-243

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, *Plaintiff*,

v.

CSX TRANSPORTATION, INC., *Defendant.*

June 16, 1987

William G. Mahoney, Washington, D.C., John R. Ferrelle, Brunswick, Ga., for plaintiff.

Malcolm R. Maclean, Savannah, Ga., James S. Whitehead, Chicago, Ill., for defendant.

ORDER

ALAIMO, Chief Judge.

In this action, the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees ("BRAC") seeks to enjoin defendant, CSX Transportation, Inc. ("CSX"), from closing its heavy freight car repair shop in Waycross, Georgia, and transferring the employees and repair work from Waycross to another shop located in Raceland, Kentucky. In es-

sence, BRAC contends that the shop transfer constitutes a change in the terms and conditions of employment for Waycross employees which may not be unilaterally imposed by CSX without complying with the mediation procedures required by the Railway Labor Act, 45 U.S.C. §§ 152 Seventh, 156 ("RLA"). Defendant has moved to dismiss or, in the alternative, for summary judgment on BRAC's complaint seeking a declaratory judgment and injunctive relief. In response, BRAC has cross-moved for partial summary judgment.

Since the Interstate Commerce Commission ("ICC") is empowered by 49 U.S.C. § 11341 to exempt certain transactions from "all other law . . . as necessary to . . . carry out the transaction," and since, in 1980, the ICC approved CSX's acquisition of control over the railroads which formerly had independently operated these repair shops, the Court is of the opinion that the shop transfer is exempt from the application of the RLA and, accordingly, BRAC is not entitled to the relief it seeks. Plaintiff's petition for a preliminary injunction will, therefore, be denied and the remainder of its complaint dismissed for failure to state a claim on which relief can be granted. In addition, plaintiff's cross-motion for partial summary judgment will be denied.

This case has taken a procedurally serpentine course and has required the application of distinct bodies of law which, at best, must be characterized as "in tension." The unusually complicated posture of this case and the unsettled nature of the applicable law merit a detailed explanation, which the Court will attempt to provide by way of the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The Interstate Commerce Commission, by order of September 23, 1980, approved an application of the CSX Corporation to acquire control of the railroad subsidi-

aries of Chessie System, Inc. ("Chessie"), and Seaboard Coast Line Industries, Inc. ("SCLI"). As a result of this transaction, CSX was the suriving partner of a merger between Chessie and SCLI. Chessie, until that time, had controlled the Chesapeake and Ohio Railway Company ("C & O"), which operated a heavy freight car repair shop at Raceland, Kentucky. At that time, SCLI controlled the Seaboard Coast Line Railway Company ("Seaboard"), which then operated its heavy freight car repair shop at Waycross, Georgia. The ICC authorized Chessie and SCLI to merge into CSX, while their individual railroad subsidiaries, such as C & O and Seaboard, were to remain separate corporate entities. In order to protect carrier employees affected by the consolidation, "as well as those who may be affected in the future, but are not now identified specifically," the ICC imposed the so-called *"New York Dock"* conditions. Employees affected by actions of their employer taken pursuant to the ICC's authorization are entitled to the protections embodied in the *New York Dock* conditions. *CSX —Control—Chessie and Seaboard C.L.I.*, 363 I.C.C. 521 (1980); *see also New York Dock Ry. v. U.S.*, 609 F.2d 83 (2d Cir. 1979).

2. Article I, Section 4(a) of the *New York Dock* conditions provides that a carrier proposing to take an action pursuant to the ICC's authorization that may cause the dismissal or displacement of its employees must give its employees at least 90 days written notice. If the parties are unable to reach agreement on the implementation of the proposed action, either party may submit the dispute to binding arbitration before a neutral referee.

3. On August 29, 1986, CSX served a formal notice under Article I, Section 4 of the *New York* conditions that it intended to close the Waycross heavy repair shop and transfer the employees and the work that otherwise would be performed there to the C & S heavy repair shop in Raceland, Kentucky. The notice stated that 149 job

positions at Waycross would be abolished (121 occupied by BRAC members) and that 107 new job positions would be created at Raceland (99 in crafts represented by BRAC) to perform the work that would be transferred from Waycross. Thus, the notice informed BRAC that the Waycross shop would be closed and that, by January of 1987, 22 BRAC-represented jobs would be lost.

4. After attempts to negotiate an implementing agreement on the transfer were unsuccessful, BRAC requested on October 10, 1986, that the dispute be referred to binding arbitration under the *New York Dock* conditions, as well as under a provision of a collective bargaining agreement governing Seaboard employees who were employed in 1967. That agreement, due to the color of its cover, is known as the "Orange Book" agreement. On October 15, 1986, CSX also called for arbitration under the *New York Dock* conditions. BRAC later challenged the applicability of the *New York Dock* conditions, contending in a letter of November 2, 1986, that the closing of the Waycross shop and the transfer to Raceland had not been authorized by the ICC in the *CSX—Control* case and, therefore, were not subject to compulsory arbitration under the *New York Dock* conditions.

5. On December 17, 1986, BRAC filed this action for declaratory judgment and injunctive relief, alleging that the closing of the Waycross shop and transfer of the work to Raceland, Kentucky, constituted a unilateral modification of existing rules and working conditions in violation of the Railway Labor Act ("RLA"), 45 U.S.C. §§ 152 Seventh and 156. BRAC also sought a declaratory judgment that CSX's attempt to effectuate the transfer through compulsory arbitration violated the arbitration procedures set forth in § 157 First of the RLA. Finally, BRAC sought preliminary and permanent injunctive relief to protect employees from harm pending exhaustion of the mandatory notice, negotiation and mediation procedures of the RLA. 45 U.S.C. §§ 155-157, 160.

6. On December 18, 1986, a hearing was held before the arbitration committee pursuant to the *New York Dock* conditions. CSX and BRAC addressed a variety of issues to the committee, including: whether the transfer could be undertaken pursuant to the ICC's authorization; whether CSX had given BRAC sufficient notice of the transfer; whether the Seaboard employees protected by the "Orange Book" could be transferred off of Seaboard property in alleged derogation of that agreement; whether the work covered by the Seaboard collective bargaining agreement could be made subject to a C & O agreement; and what the ultimate terms of an implementing agreement should be.

7. On December 26, 1986, CSX posted a notice that the jobs of 21 employees at the heavy repair shop in Waycross would be abolished effective January 2, 1987, and BRAC sought a temporary restraining order ("TRO") in this Court to enjoin the proposed job abolishments. The Court denied BRAC's request for a TRO following a hearing on December 31, 1986, and scheduled a hearing on BRAC's motion for a preliminary injunction on January 9, 1987.

8. At the hearing on January 9, 1987, CSX presented evidence that the furloughs of January 2, 1987, were not caused by the impending shop transfer but, rather, were a result of a decline in the amount of available work scheduled for Waycross in 1987. BRAC showed that CSX failed to provide specific information in August of 1986 as to the nature of the work that was intended to be transferred to Raceland. Representatives of CSX testified that the decision to close the Waycross shop was made pursuant to a variety of considerations, including the following: that CSX's freight car repair costs are too high; that CSX has an over-capacity of repair facilities; and that the Raceland shop has superior technical and commercial potential. The testimony also showed that the repair work projected as available for

Waycross in 1987 would have necessitated a reduction in force regardless of the plan to transfer the work to Raceland. Although evidence demonstrated that CSX had dismantled much of the Waycross shop's machinery and office materials and loaded them onto railroad cars during December of 1986, CSX stated that it would not implement the transfer until it received a favorable decision from the arbitration committee granting CSX permission to implement the transfer. The evidence further demonstrated that some Waycross equipment had already been reassembled and put back into place and that a program of repair work to be performed in Waycross had begun. Finally, BRAC admitted that, if the arbitration committee rendered a decision favorable to BRAC, the need for a preliminary injunction would evaporate.

9. On March 23, 1987, the neutral member of the arbitration committee issued his decision, with both the union and the carrier representatives dissenting. The arbitrator found that, because the shop transfer was necessary to allow CSX to carry out the ICC-approved merger, it was exempt from the RLA. However, on finding that the transfer of the Orange Book employees was not necessary to the consummation of the merger, the arbitrator ruled the Orange Book-protected employees could not be compelled to accept positions in Raceland. CSX appealed this decision to the ICC on April 13, 1987; BRAC filed a cross-appeal on May 26, 1987.

10. On May 8, 1987, CSX filed a motion to dismiss or, in the alternative, for summary judgment addressing the merits of BRAC's complaint before this Court. After securing an enlargement of time in which to respond, BRAC responded to CSX's motion and cross-moved for partial summary judgment on June 9, 1987.

11. BRAC came before the Court once again on June 1, 1987, seeking a TRO to enjoin the shop transfer. This time BRAC contended that, if the transfer were to be implemented while the appeal of the arbitrator's decision

to the ICC was still pending, those Orange Book employees who elected to stay in Waycross would run the risk of losing the present opportunity to bid on jobs in Raceland. Although the arbitrator held that Orange Book employees could not be compelled to move to Raceland, CSX's appeal of that decision presented the risk that the ICC would hold the reverse to be true. Such a situation would force Orange Book employees to face a dilemma: if they elected to stay in Waycross, they would be taking the chance that the ICC would later rule they could be moved to Raceland at a time when the bidding on Raceland jobs was over and the jobs filled by other workers. At a hearing before the Court on June 2, 1987, CSX stated that it would hold open positions in Raceland for any Orange Book-protected employees who might later desire to bid on Raceland jobs in the event that the arbitrator's decision is reversed. The Court granted BRAC's request for a TRO for a period of 10 days to preserve the status quo pending disposition of the various motions.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over this action under 28 U.S.C. §§ 1331 and 1337(a), as well as under 45 U.S.C. §§ 152 First, Seventh and 156, and under 49 U.S.C. 11341. The case presents the federal question of whether CSX's proposed transfer of the employees and work at the Waycross repair shop to Raceland, Kentucky, constitutes a violation of the Railway Labor Act, 45 U.S.C. §§ 152, First and Seventh, and 156; or whether the proposed transaction is exempt from the application of the RLA due to the ICC's exercise of its exemption power under the Interstate Commerce Act, 49 U.S.C. § 11341(a).

2. Under the Railway Labor Act, a covered employer may not "change the rates of pay, rules, or working

conditions of its employees . . . except in the manner prescribed in such agreements or in Section 6 of this Act." 45 U.S.C. § 152 Seventh. BRAC contends that the proposed shop transfer constitutes the kind of unilateral "major change" which requires compliance with the voluntary mediation and arbitration provisions in 45 U.S.C. § 156. *See Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U.S. 711, 723-24, 65 S.Ct. 1282, 1289-90, 89 L.Ed. 1886 (1945). Once a showing has been made that the employer and the union are engaged in a "major" dispute over a proposed change in working conditions, the Court has the power to issue an injunction to prevent either party from altering the status quo until the RLA mediation process has been exhausted. *Detroit & Toledo Shore Line Railroad Co. v. United Transportation Union*, 396 U.S. 142, 150, 90 S.Ct. 294, 299, 24 L.Ed.2d 325 (1969). CSX contends that the proposed transfer is not a "major" change and that, even if it were, the requirements of the RLA have been superseded by the Interstate Commerce Act, 49 U.S.C. § 11341(a), to the extent that such requirements interfere with the implementation of a transaction approved by the ICC.

3. The Interstate Commerce Act confers on the ICC the authority to approve transactions with the following effect:

> A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust law or any other law, including state or municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.

49 U.S.C. § 11341(a). In addition, whenever the ICC approves of a proposed transaction, the ICC must require the carrier to "provide a fair arrangement . . .

protective of the interest of employees who are effected by the transaction." 49 U.S.C. § 11347.

4. In its order of September 23, 1980, the ICC approved of CSX's acquisition of control of the railroad subsidiaries of Chessie and SCLI and imposed the *New York Dock* conditions to protect the interests of labor affected by the transaction. The 1980 ICC order stated that the approved transaction "will enable CSX to consolidate control of two railroad systems which geographically meet end-to-end, with minor exceptions, and will enable the operation of single-system service connecting the East and Midwest with the Southeast." *CSX Corp.—Control, supra* at 529. The ICC expected resulting employee displacements to be short term and to occur only at points "where the basically end-to-end systems meet." However, the ICC also found that future coordinations might well be necessary to effectuate the full implementation of the approved transaction. For example, the ICC stated: "It is certainly possible that as the two systems mesh their operations, additional coordinations may occur that could lead to further [employee] displacements." *Id.* at 589. The ICC ruled that the *New York Dock* conditions afforded employees adequate protections in the event of such future dislocations.

5. Invoking the *New York Dock* conditions, the parties entered into binding arbitration in order to reach an implementing agreement for the proposed shop transfer that would provide sufficient safeguards for the rights of affected employees. In his Opinion and Award of March 23, 1987, the neutral member of the arbitration committee, John B. LaRocco, found that the Raceland coordination "although not expressed in the control application . . . is an approved transaction exempt from the Railway Labor Act." Arbitration Committee Award at 33. The arbitrator further recognized that "the exemption is only triggered when necessary," that is, where the RLA or

the terms of existing collective bargaining agreements "thwart or substantially impede the approved transaction." *Id.*

6. Since BRAC contends that the proposed shop transfer violates the RLA, the Court must determine whether an exemption for the proposed shop transfer is "necessary to let [CSX] carry out the transaction." *I.C.C. v. Brotherhood of Locomotive Engineers, et al.*, —— U.S. ——, —— n.13, 107 S.Ct. 2360, 2377 n.13, 95 L.Ed.2d [222] (U.S. 1987) (Stevens, J., concurring), *citing* 49 U.S.C. § 11341(a). The broad scope of the control application approved by the ICC in this case, which foresaw the need for "additional coordinations" as the two systems "mesh[ed] their operations," supports a finding that an exemption from the requirements of the RLA is necessary to permit the shop transfer and thereby carry out the approved transaction.

7. Under the law of this Circuit, the ICC "exceeds the scope of its authority when it voids contracts that are not germane to the success of the approved . . . transaction." *City of Palestine, Texas v. United States*, 559 F.2d 408, 414 (5th Cir. 1977). The former Fifth Circuit, whose precedent binds this Court, reasoned that "Congress intended to empower the ICC to set aside state law restraints only insofar as necessary to assure the effectuation of the approved transactions." *Id.* at 415. This analysis comports with the interpretation of the Interstate Commerce Act adopted by Justice Stevens' concurring opinion in *I.C.C. v. Brotherhood of Locomotive Engineers, et al., supra*, an opinion which this Court considers dispositive of this case. Justice Stevens explained:

> [Section] 11341 [of the Interstate Commerce Act] automatically exempts a person from "other laws" whenever an exemption is "necessary to let that person carry out the transaction . . ." 49 U.S.C. § 11341. The breadth of the exemption is defined by

> the scope of the approved transaction, and no explicit exemption is required to make the statute applicable.

Id. at ——-——, 107 S.Ct. at 2375.

8. After a painstaking review of all the documents in the record, the Court is of the opinion that, without an exemption pursuant to 49 U.S.C. § 11341, CSX would be unable to implement the proposed shop transfer, and the ICC-approved transaction could not be fully carried out. A reading of the ICC's order granting approval to CSX's control application yields a clear intention on the part of the ICC to permit CSX to consolidate the control of the C & O and Seaboard railroads in order to provide "single system service." Providing such service would not be possible if shop transfers such as the one proposed here were effectively prohibited by the application of the RLA. Although the ICC could not foresee every conceivable coordination resulting from the merger that would result in the displacement of employees, it granted approval of the merger with the proviso that the *New York Dock* conditions be applied to any future dislocations.

9. Having concluded that the proposed shop transfer *is* necessary to effectuate the CSX merger approved by the ICC, the Court finds that this transfer was exempted by the ICC from the application of the RLA and the relevant collective bargaining agreements. With reference to the Orange Book agreement, the Court considers that the arbitrator's finding that the Orange Book employees may not be compelled to move to Raceland has rendered moot BRAC's request for injunctive relief as it relates to Orange Book employees. For the purposes of this Order, however, the Court concurs with the findings made by the arbitrator on the issue of whether the transfer of the Orange Book employees was "necessary" in order to implement the approved transaction.

CONCLUSION

In accordance with the preceding findings of fact and conclusions of law, BRAC's complaint for declaratory judgment and injunctive relief must be dismissed. Accordingly, BRAC's motion for a preliminary injunction and cross-motion for partial summary judgment are hereby DENIED. CSX's motion to dismiss or, in the alternative, for summary judgment is hereby GRANTED. The Clerk of the Court is directed to enter an appropriate judgment of dismissal.

APPENDIX C

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 28905 (Sub-No. 22)

CSX CORPORATION—CONTROL—CHESSIE SYSTEM, INC. and SEABOARD COAST LINE INDUSTRIES, INC.

Finance Docket No. 21215 (Sub-No. 4)

SEABOARD AIR LINE R.R. CO.—MERGER—ATLANTIC COAST LINE R.R. CO.

Decided: June 8, 1988

(Service Date June 23, 1988)

Arbitration award reversed in part.

DECISION

BY THE COMMISSION:

On April 13, 1987, CSX Transportation, Inc. (CSX) and The Chesapeake and Ohio Railway Company (C&O) jointly filed a petition for administrative review of an arbitration committee's opinion and award in *Brotherhood Railway Carmen—A Division of BRAC* v. *CSX Transportation, Inc., and The Chesapeake and Ohio Railway Company* (LaRocco, March 23, 1987) (*BRC* v. *CSX*). The petition was filed in accordance with our decision in *Chicago and North Western Tptn. Co.—Abandonment*, 3 I.C.C.2d 729 (1987) (the so-called *Lace Curtain* decision).[1] There, we announced our appellate

[1] "Lace Curtain" refers to a moving allowance provided under Article I, section 9 of *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979), the decision setting forth labor protective conditions imposed in the cited abandonment proceeding.

jurisdiction over, and scope of review of, arbitration awards that involve disputes over Commission-imposed labor protective conditions. On May 26, 1987, the Brotherhood Railway Carmen, Division of Brotherhood of Railway & Airline Clerks (BRC) filed an answer and cross-complaint in response to the CSX/C&O petition.[2] On June 15, 1987, CSX and C&O filed an answer to BRC's cross-complaint.

The arbitration committee was convened under the labor protective conditions we imposed in the lead consolidation proceeding [*CSX Corp.—Control—Chessie and Seaboard Co. L. I.*, 363 I.C.C. 521 (1980) (*CSX-Control*)]. At issue is a dispute concerning CSX/C&O's plan to close a freight car heavy repair shop at Waycross, GA, and to transfer the functions and most of the employees of that facility to a repair shop at Raceland, KY. In *BRC* v. *CSX*, the arbitration committee directed the parties to adopt an implementing agreement governing the repair shop transfer. Under the implementing agreement, the Waycross facility would be closed and the work formerly performed at Waycross and the Waycross employees would be transferred to Raceland, except that employees entitled to the benefits under the so-called "Orange Book" agreement [a labor protective agreement negotiated between a CSX predecessor, Seaboard Coast Line Railroad Company (SCL), and its unions, including BRC] could not be compelled to transfer to Raceland. As described above, CSX then sought review of the award.

We have undertaken a full administrative review of this arbitration proceeding because it involves a dispute under the labor protective conditions imposed in *CSX-Control* and raises significant issues of general importance to that and other consolidation decisions. We are

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[2] In *Lace Curtain, supra,* we stated that these petitions for administrative review should be treated as complaints because they allege that the arbitration decisions misconstrued the Interstate Commerce Act and our labor protective conditions.

reversing that part of the arbitration committee's decision that created an exception to its prescribed implementing agreement for Orange Book employees. This portion of the decision conflicts with the consolidation transaction authorized in *CSX-Control.*

PRELIMINARY MATTERS

By decision served June 10, 1987, we denied BRC's May 22, 1987, request for a cease and desist order that sought to prevent CSX/C&O from implementing the repair shop transfer. We took under advisement BRC's embraced motion to dismiss CSX/C&O's petition for administrative review In support of its motion to dismiss, BRC argues that, because CSX/C&O have begun to implement the repair shop transfer under the arbitration committee's decision, they have accepted the decision and waived their right to challenge it.

We are denying BRC's motion to dismiss. CSX/C&O have not waived their right to appeal the arbitration committee's decision. Their petition challenges only the Orange Book employee exception imposed in the arbitration committee's decision. Even though CSX/C&O have held open a sufficient number of positions at the Raceland facility to accommodate Waycross employees covered by the Orange Book agreement, it is clear that CSX/C&O have taken these precautions only to allow them to institute the transfer without breaching their legal obligations under the Orange Book exception should they fail to have it reversed. Thus, CSX/C&O have not acquiesced in the committee's decision.

CSX/C&O request waiver of 49 CFR 1115.2(d), which limits the length of appeals to 30 pages. Part 1115 does not technically apply to this matter. In any event, most of the extra pages in the CSX/C&O petition consists of pertinent portions of the lengthy arbitration record, which is helpful to our review.

BRC challenges our jurisdiction to decide the CSX/C&O petition. It contends, *inter alia*, that CSX/C&O's August 29, 1986, notice to BRC of the proposed repair shop transfer was inadequate under the requirements of the labor protective conditions imposed earlier in this proceeding. BRC requests dismissal of the CSX/C&O petition or, alternatively, oral hearing on the notice issue based on new evidence that BRC obtained after the arbitration hearing.

BRC's request is denied. The arbitration committee considered the notice issue, and, in a letter to the parties dated March 23, 1987, Arbitrator LaRocca [*sic*] denied BRC's motion to reopen based on the same evidence. Consistent with the substantial deference we will accord arbitrators on fact-bound issues, we will not reweigh the evidence here. Even if this issue involves interpreting our labor protective conditions, as BRC contends, we are satisfied that the interpretation was not improper.

Finally, BRC further challenges our jurisdiction by arguing that Federal district courts have exclusive jurisdiction to review arbitration decisions under 49 U.S.C. 11795(a) [*sic*] [11705(a)] and that we may review the considered arbitration decision only by court referral. However, this argument was recently rejected in *United Transp. Union* v. *Norfolk & Western Ry.*, 822 F.2d 1114 (D.C. Cir. 1987), *cert. denied*, 108 S.Ct. 700 (1988) (*UTU* v. *N&W*), where the District of Columbia Circuit Court of Appeals affirmed the dismissal of a railroad union's appeal of an arbitration award issued under Commission-imposed labor protective conditions. The Court of Appeals found that such an award is an order of the Commission, which, if final, is reviewable only by the Court of Appeals and, if not final, is not ripe for judicial review. We made similar findings in *Lace Curtain* and described our scope of review for arbitration decisions. We found that arbitration decisions are not final as to issues within our described scope of review. *Lace Curtain*,

supra. We affirm those findings and reject BRC's contentions.

BACKGROUND

In *Seaboard Air Line R. Co.—Merger—Atlantic Coast Line*, 320 I.C.C. 122 (1963) (*SAL—Merger—ACL*), we approved the consolidation of Seaboard Air Line Railroad Company (SAL) and Atlantic Coast Line Railroad Company (ACL), which later became SCL. The approval was subject to the labor protective conditions set forth in *New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271 (1952), as modified in *Southern Ry. Co.—Control—Central of Georgia Ry. Co.*, 317 I.C.C. 557 (1962), 317 I.C.C. 729 (1963), and 320 I.C.C. 377 (1964) (*New Orleans*). Following our approval, and pursuant to the provision in former section 5(2)(f), now section 11347, permitting labor protection to be determined by agreement between rail carriers and employee representatives, SAL and ACL entered into the Orange Book agreement with BRC and 16 other unions. Under section 2 of the Orange Book agreement, all SAL and ACL employees were to be hired by SCL and receive so-called "attrition" labor protections. Under these protections, the employees would not be placed in a worse position with respect to compensation, rules, working conditions, fringe benefits, or related rights or privileges for their working lives. In exchange for these protections, SCL was entitled, under section 3(a) of the Orange Book agreement, to transfer the work of employees throughout the consolidated SCL system, and the parties were to enter into implementing agreements providing for the transfer and use of employees and allocation or rearrangement of forces made necessary by changes for which protection was provided.

In *CSX-Control*, *supra*, we approved CSX Corporation's application to control two non-carrier holding companies, the Chessie System, Inc., and Seaboard Coast Line Industries, Inc. (SCLI). Chessie controlled two

major railroads, C&O and the Baltimore and Ohio Railroad (B&O), and SCLI controlled SCL. The railroad subsidiaries remained separate entities.[3] *Id.* at 575. The approval was subject to the so-called *New York Dock* labor protective conditions [*New York Dock Ry.—Control—Brooklyn East Dist.*, [3]60 I.C.C. 60 (1979)].[4]

On August 29, 1986, CSX/C&O issued written notice to BRC of their intent to close CSX's Waycross car repair facility and simultaneously to transfer the functions of that facility to the C&O's Raceland freight car heavy repair shop. The notice stated that work moved from Waycross would be ". . . coordinated with such work presently being performed at Raceland under the C&O Agreement." Approximately 50 percent of the employees currently occupying positions at the Waycross repair shop would be covered by the Orange Book Agreement.

In their notice, CSX/C&O informed BRC of their intent to abolish 149 positions at Waycross and establish 107 positions at Raceland. BRC represents 121 of the incumbents holding positions slated for abolition. By class, the BRC incumbents are 99 carmen, 4 carmen helpers, 13 painters, and 5 painter helpers. With regard to these classes, CSX/C&O estimated that it would create positions for 86 carmen, 3 carmen helpers, 6 painters, and 4 painter helpers to perform the work transferred to Raceland from Waycross. As to other classes of in-

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[3] On December 29, 1982, SCL merged with the Louisville and Nashville Railroad Company to form the Seaboard System Railroad, Inc. (SSR). On July 1, 1986, SSR changed its name to CSX Transportation, Inc. (CSXT). Subsequently, B&O was merged into C&O, which in turn was merged into CSXT on August 31, 1987. *See* Finance Docket No. 31106, *Chesapeake & Ohio Ry. and CSX Transp., Inc. Merger Ex.* (not printed), served September 18, 1987.

[4] *New Orleans* and *New York Dock* provide similar protections for affected employees and similar dispute resolution remedies, including arbitration.

cumbents at Waycross, CSX/C&O indicated that they would abolish 3 clerical positions, 11 blacksmith positions, 6 laborer positions, 3 machinist positions, 4 sheet metal worker positions and 1 electric crane operator position. At Raceland, the carriers intended to establish only 1 clerical, 4 blacksmith and 3 laborer positions. CSX/C&O estimate that, under the arbitration committee's decision prohibiting the transfer of employees subject to the Orange Book Agreement, it could not require 57 Waycross carmen to transfer to Raceland.

After CSX/C&O served the August 29, 1986, notice, the parties conferred at least twice to negotiate an implementing agreement. Their bargaining efforts were unsuccessful, primarily because of disagreements over the application of certain Orange Book provisions, the interrelationship between the Orange Book and a *New York Dock* implementing agreement, and CSX/C&O's right to implement the transaction without first complying with the Railway Labor Act, 45 U.S.C. 151 *et seq.* (RLA). Thereafter, BRC and later CSX/C&O invoked arbitration in accordance with Article 1, section 4(a) of the *New York Dock* conditions and section 4 of the Orange Book agreement.

The arbitration committee found that the repair shop transfer is a transaction subject to the *New York Dock* conditions imposed in *CSX-Control* because the transfer is an action taken pursuant to our control authorization within the meaning of Article 1, section 1(a) of *New York Dock*. *See BRC* v. *CSX*, *supra*, at 29-30. The committee derived its authority to impose an implementing agreement for the repair shop transfer under section 4(a) of *New York Dock*, which requires that "any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4." *Id.* at 30. The committee recognized that, because it derived its authority from the *New York Dock* conditions we imposed in *CSX-Control*, it was

a quasi-judicial extension of the Commission and therefore bound to follow our pertinent interpretations of the Interstate Commerce Act. *Id.* at 31. The committee then considered the Commission's views on the conflict between (1) the requirement in Article 1, sections 2 and 3, of the *New York Dock* conditions that rights under existing collective bargaining agreements be preserved; and (2) the authority of an arbitrator under Article 1, section 4, of *New York Dock* to authorize reassignment of employees in order to carry out the approved transaction. The committee found the Commission's view to be that the arbitrator could override provisions in collective bargaining agreements if they conflict with implementation of the transaction. *Id.* at 33. The committee also considered the conflict between the Railway Labor Act's (RLA) extended dispute resolution mechanism for altering agreements and the final and binding effect of arbitration under section 4 of *New York Dock* permitting prompt changes in working conditions. The committee found that RLA procedures were overridden by the *New York Dock* procedures. It relied on expressions of the Commission's views in decided precedent and in Commission pleadings, as well as the exemptive effect of section 11341(a). Accordingly, despite a perceived conflict between the Orange Book agreement and the carrier's proposal, the committee found that it had "jurisdiction to formulate an implementing agreement governing the transfer of work and employees from Waycross to Raceland." *Id.* at 34. This statement that it had the authority to override existing agreements by requiring the work and employees to be moved summed up the committee's view of Commission policy on this issue. It also acknowledged our decisions holding that, under the immunity provisions of 49 U.S.C. 11341(a), implementation of transactions that we authorize under 49 U.S.C. 11343, such as *CSX-Control*, supersede employee protections under the RLA and collective bargaining agreements that conflict with those

transactions.[5] *See* Finance Docket No. 30,000 (Sub-No. 18), *Denver and Rio Grande Western Railroad Company—Trackage Rights—Missouri Pacific Railroad Company Between Pueblo, CO and Kansas City, MO, et al.* (not printed), served October 25, 1983. (*DRGW*), *rev'd sub. nom. Brotherhood of Loc. Engineers.* v. *ICC*, 761 F.2d 714 (D.C. Cir. 1985), *rev'd on other grounds*, —— U.S. —— (June 8, 1987); and Finance Docket No. 30532, *Maine Central R.R. Co. Georgia Pacific Corp., Canadian Pacific, Ltd. and Springfield Terminal Ry. Co.—Exemption from 49 U.S.C. 11343* (not printed), served September 13, 1985 (*Maine Central*), *aff'd mem. sub nom. Railway Labor Execs. Ass'n* v. *ICC*, No. 85-1636 (D.C. Cir. Mar. 16, 1987).

The arbitration committee nevertheless held that the repair shop transfer should "reasonably accommodate" existing collective bargaining agreements and collective bargaining rights as well as existing merger protection agreements. *BRC* v. *CSX*, *supra*, at 33-34. The committee interpreted section 3(a) of the Orange Book agreement as barring CSX/C&O from transferring Orange Book protected *employees* or their *work* beyond former SCL property. It reasoned that the merging carriers could have foreseen that SCL might later become part of

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[5] Section 11341(a), as pertinent, reads as follows:

> The authority of the Interstate Commerce Commission under this subchapter is exclusive. A carrier or corporation participation in or resulting from a transaction approved by or exempted by the Commission under this subchapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other laws, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction. * * * *

an even larger system. Thus, the drafters of the Orange Book could have easily written terms permitting unrestricted transfers across any enlarged system. *Id.* at 35-36. The committee recognized, however, that under *DRGW*, the Orange Book limitation on the transfer of work must be subordinated to CSX/C&O's right to engage in the authorized *New York Dock* transfer transaction. Otherwise the carriers would be effectively prevented from implementing the repair shop transfer. *Id.* at 36-37. Despite this, however, the committee refused to relieve CSX/C&O from the restriction against transferring Orange Book protected employees beyond SCL property. The Committee found that this limitation would only "slightly impair" the transaction while preserving the essence of the Orange Book agreement as required under sections 2 and 3 of the *New York Dock* conditions.[6]

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[6] *New York Dock* sections 2 and 3 read as follows:

> 2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.
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> 3. Nothing in this appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such employee may have under any existing job security or other protective conditions or arrangements; *provided*, that if an employee otherwise is eligible for protection under both this appendix and some other job security or other protective condition or arrangement, he shall elect between the benefits under this appendix and similar benefits under such other arrangement and, for so long as he continues to receive such benefits under the provisions which he so elects, he shall not be entitled to the same type of benefit under the provisions which he does not so elect; provided further, that the benefits under this appendix, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits; and, *provided further*, that after

CSX/C&O contend that the arbitration committee's Orange Book employee exception may not stand because it conflicts with proper implementation of the repair shop transfer and our consolidation authorization in *CSX-Control.* They also argue that the Orange Book exception is based on a misinterpretation of the Orange Book agreement.

BRC contends that the repair shop transfer is not a transaction contemplated in *CSX Control* and, thus, not authorized under section 11343. Consequently, BRC contends that the arbitration committee exceeded its authority by allowing CSX/C&O to transfer the repair shop work at Waycross to Raceland beyond the SCL system, thus unilaterally abrogating the Orange Book agreement. BRC also argues that, even if the transaction were authorized by *CSX Control,* the committee impermissibly overrode sections 2 and 3 of *New York Dock* which require the preservation of collective bargaining agreements such as the Orange Book.

DISCUSSION AND CONCLUSIONS

The starting point in our review of an arbitration decision is the appropriate standard of review to be applied by us. *See* discussion of these standards in *Lace Curtain,* 3 I.C.C.2d at 735-36, and our recent decision in F.D. No. 28490 (Sub-No. 1), *Atlantic Richfield Company and Anaconda Company—Control—Butte, Anaconda & Pacific Railroad Company* (not printed), served March 2, 1988 (*ARCA*), slip op. 6-7. A principal reason for starting with the standard of review is that much of our task can be ended there as well. As we indicated in *Lace Curtain,* 3 I.C.C.2d at 735-36, we do not propose to de-

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expiration of the period for which such employee is entitled to protection under the arrangement which he so elects, he may then be entitled to protection under the other arrangement for the remainder, if any, of this protective period under that arrangement.

vote significant Commission time or resources to the review of an arbitrator's decision. We will employ an extremely limited standard of review, according substantial deference to the arbitrator's competence and special role in resolving labor disputes and giving a strong presumption of finality to an award. Our deference to the arbitrator's decision will vary with the nature of the issue involved, ranging from the most deferential treatment in the case of evidentiary issues such as causation, *Lace Curtain*, 3 I.C.C.2d at 736, *ARCA* at 9, to significantly less deference when reviewing interpretations of Commission regulations or orders and matters of transportation policy. *Id.*

Applying these standards to this case, we accord substantial deference to the arbitration committee's causual [*sic*] determination that the Waycross-Raceland transfer is a transaction authorized by the Commission's approval in *CSX-Control*. *BRC* v. *CSX* at 33. *Cf. ARCA* at 8-10. The Committee applied the proper standards in arriving at the determination, *BRC* v. *CSX* at 29-33, and we decline to re-examine it. Accordingly, the arbitration committee also properly determined that the *New York Dock* conditions imposed by us in *CSX-Control* are applicable to employee dislocations caused by the Waycross-Raceland transfer.

Having found that the *New York Dock* conditions apply, the next major task for the committee was to explore the relationship between the absolute authority given the committee by section 4 of those conditions to effect changes in work and employee assignments through the implementing agreement, on the one hand, and, on the other, the preservation of collective bargaining agreements and rights (including Orange Book rights) under sections 2 and 3 of those conditions and the dispute resolution procedures under the Railway Labor Act. The committee recognized that its views on this issue, a significant question of interpretation of a Commission order

and policy, were entitled to no deference upon review by this Commission. This is evident when it stated (p. 31), "as a quasi-judicial extension of the ICC, this committee must strictly follow the ICC's interpretation of its own authority." As we have described above (p. 4), the committee found that it was empowered to override collective bargaining rights, such as those in the Orange Book, and RLA rights in formulating the implementing agreement. Believing it had the authority to move both work and employees to Raceland, despite potentially conflicting provisions in the RLA and the *New York Dock* conditions themselves ("the ICC has emphasized that a transaction hurdles all legal obstacles preventing implementation," award at 34). This is a correct statement of our position and we affirm the committee's finding on its authority.

The committee went on, however, to contradict its own statements and imposed a significant, if not insurmountable, obstacle to implementation of the transfer by prohibiting the reassignment of SCL employees to Raceland. This decision of the committee rests on an interpretation of the Commission's conditions and is a matter of Commission policy. As such, it is not entitled to deference. We find its ruling on this issue to be "egregious error," *Lace Curtain*, 3 I.C.C.2d at 735, and accordingly reverse the committee and remand the proceeding to them for further proceedings in accordance with this decision. While finding that the Orange Book provision on transfer of work "must be subordinated to the Carrier's right" to carry out the authorized transaction (pp. 36-37), the committee inconsistently, we believe, failed to give the same effect to the limitation on transfer of workers contained in the same provision. On its own, the committee fashioned a standard of "slight impairment of the transaction" (p. 37) for permitting a provision of a collective bargaining agreement to conflict with the implementation of an approved transaction, contradicting the ICC standard given by the committee at p. 34. The standard applied by the committee would effectively undercut the Commis-

sion's authorization of the transaction here. As we will discuss below, we cannot affirm the committee on this issue.

As we indicated, even if the committee did properly interpret the Orange Book as prohibiting the transfer of employees outside former SCL limits, its attempted "accommodation" of this supposed prohibition to the proposed transaction must be overturned because the Orange Book agreement as interpreted by the committee serves as an impediment to implementation of a transaction authorized by the Commission. Once it is determined that a proposed transaction is authorized by the Commission (and we have affirmed the committee's finding that this transfer of repair work was authorized in *CSX-Control*), the carrier is permitted to carry out and fully implement the transaction despite potential impediments in existing agreements upon compliance with the provisions for the protection of the rights of employees contained in *New York Dock* or imposed by the Commission upon the involved tranaction. As the committee found, and we agree, it has the authority to override these obstacles in the implementing agreement it will fashion. As a matter of Commission policy and as an interpretation of our conditions, we are constrained to overturn the decision to the extent it holds that CSX may not require transfer of SCL employees as well as work from Waycross to Raceland. Such transfers are of course subject to the terms set forth in *New York Dock* for the protection of the interests of affected employees.

In any event, the evidence does not support the committee's conclusion that a prohibition against transfer of Orange Book protected employees will only "slightly impair" the implementation of the repair shop transfer. The record shows that CSX/C&O is consolidating its heavy car repair operations at Raceland because of significantly reduced work and the need commensurately to reduce its repair operations and realize cost savings and operational efficiencies. The unrebutted evidence shows

that CSX/C&O propose to establish a total of 107 positions at Raceland, including 86 carmen positions. Of the 86 Waycross carmen who are eligible for those positions, 57 are entitled to Orange Book protection. Under the arbitration committee's construction of the Orange Book, those 57 Waycross employees (over 55 percent of the proposed Raceland work force) can refuse to accept positions at Raceland. In support of its refusal to supersede the construed Orange Book prohibition, the arbitration committee concluded (*BRC* v. *CSX*, at p. 37), that some of those employees could exercise seniority to remaining positions at Waycross. However, the carriers state that, after the transfer of work, there will be no existing positions at Waycross to which these 57 carmen can exercise seniority to fill. Imposition of an Orange Book employee exception would effectively prevent implementation of the proposed transaction. We need not speculate on precisely what amount of interference with implementation of an authorized transaction is permissible. The interference here is too great.

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. The opinion and award in *BRC* v. *CSX* is affirmed in part and reversed in part as described in this decision. It is remanded to the arbitration committee for further proceedings consistent with this decision.

2. This decision is effective on the date served.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Sterrett, Simmons, and Lamboley. Commissioner Lamboley dissented and will submit a separate expression at a later date.

NORETA R. MCGEE
Secretary

(SEAL)

Finance Docket No. 28905 (Sub-No. 22)

CSX CORPORATION—CONTROL—CHESSIE SYSTEMS, INC., AND SEABOARD COAST LINE INDUSTRIES, INC.

Finance Docket No. 21215 (Sub-No. 4)

SEABOARD AIR LINE R.R. CO—MERGER—
ATLANTIC COAST LINE R.R. CO.

June 27, 1988

(Service Date June 30, 1988)

NOTICE TO THE PARTIES:

A decision by the Commission, decided *June 8, 1988*, and served June 23, 1988, stated that Commissioner Lamboley dissented and would submit a separate expression at a later date.

Attached is the separate expression of Commissioner Lamboley.

KATHLEEN M. KING
Acting Secretary

Attachment

Finance Docket No. 28905 (Sub-No. 22)

CSX CORPORATION—CONTROL—CHESSIE SYSTEM, INC., AND SEABOARD COAST LINE INDUSTRIES, INC.

Finance Docket No. 21215 (Sub-No. 4)

SEABOARD AIR LINE R.R. CO.—MERGER—
ATLANTIC COAST LINE R.R. CO.

COMMISSIONER LAMBOLEY, dissenting:

This is one in a series of three recent cases involving Commission review of arbitration awards.[1] In each case I find myself at odds with the majority's disposition.[2] I am concerned that we may becoming result-oriented in our review of awards, notwithstanding Commission standards applicable to the limited scope of deferential review.[3]

The present case involves an arbitration proceeding allegedly undertaken pursuant to the jurisdictional au-

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[1] See FD No. 29430 (Sub-No. 20), *Norfolk Southern Corp.—Control—Norfolk & Western Ry. Co. and Southern Ry. Co.*, (not printed), served June 10, 1988, (*NS-Arb*); FD No. 28583 (Sub-No. 24), *Burlington Northern, Inc.—Control & Merger—St. Louis—San Francisco Ry. Co.*, (not printed), served June 23, 1988. (*BN-Arb*)

[2] In *NS-Arb* the majority affirmed an award terminating employee RLA representation rights to effect a transfer; and in *BN-Arb*, the majority reversed and dismissed a proceeding concluding there was no jurisdiction for the award under previously imposed merger conditions.

[3] See *Chicago & Northern* [*sic*] *Western Trans. Co.—Abandonment* 3 I.C.C. [2d] 729 (1987) (aka *Lace Curtain*); FD No. 28490 (Sub-No. 1), *Atlantic Richfield Co. and Anaconda Co.—Control—Butte Anaconda & Pac. R.R. Co.*, (not printed), served March 2, 1988 (*ARCO/BAP*).

thority of the protective conditions imposed in the 1980 *CSX Corp.—Control—Chessie and Seaboard Co. L. I.* case.[4]

A close reading of the underlying *CSX-Control* case leaves substantial doubt whether there is any proximate nexus between the control transaction approved by the Commission and the transaction here at issue occurring some seven years later.[5]

In my view, causation presents a substantial jurisdictional issue in this case.[6] I believe our remand does not include appropriate instructions to guide the panel on rehearing.

From the outset, the basic question whether the arbitration panel has requisite subject matter jurisdiction has been vigorously disputed by BRC. However, the panel in its award finds and concludes it has requisite jurisdiction based upon the parties *concurrence*.[7] Quite apart from considering whether jurisdiction can be obtained by stipulation, the panel's determination on that point is simply contrary to record fact.

The essence of the BRC argument, both before the arbitration panel and the Commission, is that while transfer of work may be a transaction that customarily falls within the scope of *NY Dock* conditions, subject matter jurisdiction depends on whether a particular

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[4] 363 ICC 521 (1980) (*CSX Control*).

[5] Issues of proximate nexus and causation are discussed in *Southern Ry. Co.—Control—Central Georgia Ry Co.*, 317 I.C.C. 729 (1963) aff'd *sub. nom. RLEA v. U.S.* 266 F. Supp. 521 (ED. VA. 1964) vac'd other grounds 379 U.S. 199 (1984) [*sic*], *Leavens v. Burlington Northern, Inc.* 348 I.C.C. 962 (1977). See also recent arbitration review cases *ARCO/BAP, supra BN-Arb, supra* and *NS-Arb, supra*, (also my dissent in *NS-Arb*).

[6] Cf. *BN-Arb, supra*. Our jurisdictional authority for review here is not at issue.

[7] *Award*, p. 29.

transfer has a proximate or causal relationship to the underlying *control* transaction to which the conditions apply.[8] Thus, despite the fact that BRC generally "concurs" that a transfer transaction may be within *NY Dock* conditions, it contends this specific transaction is not because there is no proximate linkage to the transaction originally approved in the *control* case on which the conditions were imposed. Therefore, if the transfer is outside the scope of the approved transaction in *CSX-Control*, there is no requisite subject matter jurisdiction for these arbitration proceedings.[9]

A critical reading of the underlying *control* case casts serious doubt on a favorable finding of causation necessary to include this transfer transaction within the scope of the original transaction and its conditions. Nowhere in *CSX Control* was there any hint or suggestion that the Waycross-Raceland transfer was, immediately necessary, or in the future, could reasonably be anticipated as a subsequent event directly resulting from control. Indeed, the contrary would be a more ready conclusion.

In reviewing public benefits anticipated from various aspects of the control transaction, no mention is made of consolidation of heavy equipment repair at any location(s) within or between the systems to be controlled. The control transaction expressly contemplates control not merger, and continued operation of the individual railroads as separate corporate entities within each of the Chessie and SCLI rail systems. "Control" in the original transaction was little more than authority to coordinate the operation of two systems for purposes of

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[8] See *BRC* Pre-Hearing Submission, Post-Hearing Submission, and Opinion of dissenting panel member to Award; Answer and Cross complaint for review.

[9] See *Southern Ry. Co., supra*; *BN-Arb supra*, also 49 U.S.C. §§ 11341(a), 11343.

achieving expanded "single system", but not "single line service." [10]

Anticipated impact on employees, in the control transaction was not regarded as significant. Dislocations were to be "short-lived" and expected to "occur within six months following final approval." Further, "perceptible" dislocations were possible "only at points where the basically end-to-end systems meet" to mesh for coordination of operations and which points were "clearly identified".[11]

Interestingly, the Raceland facility is specifically mentioned, but only with reference limited to the creation of additional, new jobs resulting from increased production of railcars at that facility, not transfer of repair work.[12]

As a matter of procedure, the failure to include transfer of work to the Tampa facility in the company's NOTICE while possible error, in the circumstances of this case cannot be considered prejudicial. BRC had fair opportunity to address the issue. However, the panel's failure to include Tampa and consider the Waycross-Raceland-Tampa relationship may have arguably impacted a residual number of employees at Waycross without apparent work to perform, at a time when the company reasonably anticipated transferring to Tampa, work previously planned for Waycross in 1987.[13]

Finally, the majority attempts to establish the proposition that *any* conflict, regardless of origin or degree, is an impediment pre-empted by ICA provisions.[14] In my view, this represents a continuing effort to modify Com-

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[10] *CSX Control supra*, pp 533, 535, 553-556, 575-576.

[11] Id., at pp. 588-589.

[12] Id., at pp. 588-589, 641.

[13] See *Award*, Carrier Members Reply to Dissent.

[14] 49 U.S.C. § 11341(a).

mission precedent and runs contrary to existing judicial precedent.

Such precedent finds that Section 11341(a) is not absolute in its terms or in its operation; nor is it necessary that it be so in order to effect approved transactions. In a voluntary merger proceeding, the Supreme Court has held that once conditions requisite for approval have been satisfied, the Commission-approved transaction is self-executing, and further found that:

> "the parties are relieved of 'restraints limitations and prohibitions of law, Federal, State, or municipal' *insofar as may be necessary to enable them to carry into effect the transaction so approved.*" (emphasis added)[15]

The Court has also found that a "to the extent necessary" determination for exemption purposes does not require the Commission to contemplate unforeseeable legal obstacles or enumerate every legal obstacle that is waived.[16]

Courts of Appeal reviewing Commission decisions have likewise required a "to the extent necessary" showing for pre-emption purposes.[17]

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[15] *Schwabacher v. U.S.* 334 U.S. 182 (1948) (construing Section 5(11), predecessor to Section 11341).

[16] See *County of Marin v. United States*, 356 U.S. 412 (1958).

[17] See *Texas & New Orleans R. Co. v. Bhd. of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962) *cert. den.* 952 [*sic*] U.S. 934 (1963), *City of Palestine, Texas v. U.S.*, 559 F.2d 408 (5th Cir. 1977) *cert. den.* 435 U.S. 950 (1978). Also, FD No. 30000 (Sub-No. 18), *Denver & Rio Grande Western R.R. Co.—Trackage Rights Between Pueblo CO. and Kansas City, MO. (DRGW)* (not printed) (served October 19, 1983, *rev'd, sub nom., BLE v. I.C.C.*, 761 F.2d 714 (D.C. Cir. 1985) rev'd on other grounds —— U.S.—— (June 8, 1987) Cf. *BLE v. CNW*, 314 F.2d 424 (8th Cir. 1962), *cert. den.* 375 U.S. 819 (1963).

For its part, the Commission has historically taken the position that it will limit its review of issues involving application and interpretation of merger conditions. Moreover, in discussing this role, the Commission has clearly emphasized the beneficial purpose of protective conditions and the positive contribution found in accommodating the policies of the ICA and the RLA.

In *Leavens v. Burlington Northern,*[18] concluding its scope of review should be limited, the Commission held:

> "Our review should be limited to those matters that either result from the merger or which claim violation of a specific merger-related harm." Obviously, we would review such allegations only to determine whether or not the carrier has failed to implement the protections we recognized for adversely affected employees." [19]

Commenting on the special relationship between protective conditions, collective bargaining, and arbitration, the Commission observed:

> "However, in dealing with these protective conditions, the Commission is faced with a special problem—defining the extent of our ongoing responsibility to consider alleged breaches of the protective conditions for which an arbitration remedy is pro-

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[18] *Leavens, et al. v. Burlington Northern, Inc.* 348 I.C.C. 962 (1977).

[19] Id. at p. 975. This limited role was recently reaffirmed in FD No. 40074, *UTU v. Burlington Northern R. Co. and Houston Belt & Terminal Ry Co.* (not printed), served March 30, 1987). (The Commission stating: "It is clear that we have jurisdiction over those labor matters which stem from the conditions we adopted at the time the merger was authorized.") See also, FD No. 21478 (Sub-No. 7), *Great Northern Pac. & Burlington Lines, Inc.—Merger —Great Northern Ry, (Arco)* (not printed, served March 16, 1987). But see: FD No. 21478 (Sub-No. 6), *Great Northern Pac. & Burlington Lines, Inc.—Merger—Great Northern Ry, (Landis)* (not printed), served December 11, 1986.

vided. In adopting these protective conditions and the related arbitration provisions, we provided that those who were most familiar with the complexities of labor law and the peculiar problems associated with railroad employees would determine disputes arising out of such conditions. This Commission did not intend to place itself in the fields of collective bargaining or labor management relations nor do the provisions of the Interstate Commerce Act require it. We should be careful so that we do not, because of lack of expert competence, contravene the national policy as to labor relations." [20]

Emphasizing the need to accommodate the respective policies of the ICA and RLA, the Commission stated:

"Our responsibility to impose protective conditions in a merger was not meant to give the Commission a right to interfere in the normal give and take of collective bargaining.

" 'The policies of the Interstate Commerce Act and the labor act necessarily must be accommodated one to the other.' (citation omitted).

"We feel that in making the accommodation this Commission should undertake to enforce these protective conditions only to the extent stated above, i.e., to the extent that affected employees have suffered harm in violation of the adopted conditions as a result of the transaction or to the extent that a specific condition intended to protect against a specific harm that would result from the merger." [21]

More recently, the Commission has stated:

"As UTU notes standard labor protective conditions generally preserve working conditions and collective

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[20] Ibid.

[21] *Id* at p. 976.

> bargaining agreements. The terms of those conditions, however, must be read in conjunction with our revision authorizing the involved transaction and the underlying statutory scheme. *To the extent* that existing working conditions and collective bargaining agreements conflict with a transaction which we have approved, those conditions and agreements must give to the implementation of the transaction." (emphasis added.)[22]

In my view, the majority decision here seeks to enhance the dicta of *Maine Central*[23], further narrow the qualifying language of *DRGW* and ignore judicial precedent in pursuit of what I fear may be a goal to preempt application of all other laws, and at the same time, consistently deny the consideration of protections and remedies those laws provide. I continue to subscribe to the view that definition and accommodation of conflict, where possible, are more appropriate in dispute resolution proceedings.[24] To that end, I am inclined to accord substantial deference to labor arbitration proceedings.

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[22] *DRGW, supra*; also *NS-Arb, supra.* Earlier, the Commission had observed that it may nullify only those restraints that are "materially related" to a proposed merger or consolidation. See *Missouri Pac. R. Co.—Merger,* 354 I.C.C. 763 (1978) (commenting on *City of Palestine* decision.

[23] FD No. 30532, *Maine Central R. Co., et al.—Exemption from 49 U.S.C. §§ 11342 and 11343* (not printed), served September 13, 1985 *aff'd mem., sub. nom. RLEA v. I.C.C.,* 812 F.2d 1443 (D.C. Cir. 1987).

[24] See my separate expressions *NS-Arb supra, BN-Arb supra* and FD No. 30853, *Rowlett v. Missouri Pacific R. Co.,* (not printed), served August 19, 1987.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-8466

D.C. Docket No. 286-243

BROTHERHOOD RAILWAY CARMEN,
Division of Transportation
Communications International Union (TCU),
Plaintiff-Appellant,

versus

CSX TRANSPORTATION, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Georgia

Before HILL and EDMONDSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the said District Court in this cause be and the same is hereby VACATED; and that this cause be and the same is hereby, REMANDED to said District Court with instructions to dismiss for lack of subject matter jurisdiction.

It is further ordered that plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered: September 19, 1988

For the Court: Miguel J. Cortez
Clerk

By: /s/ Karleen McNabb
Deputy Clerk

Issued as Mandate: Oct. 17, 1988

APPENDIX E

STATUTES RELIED UPON

I. Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.* (Excerpts)

A. Section 11341(a), 49 U.S.C. § 11341(a)
B. Section 11343(a), 49 U.S.C. § 11343(a)
C. Section 11344(a), 49 U.S.C. § 11344(a)
D. Section 11347, 49 U.S.C. § 11347

II. Railway Labor Act, 45 U.S.C. § 151, *et seq.* (Excerpts)

A. Section 2 First, 45 U.S.C. § 152 First
B. Section 2 Seventh, 45 U.S.C. § 152 Seventh
C. Section 5 First, 45 U.S.C. § 155 First
D. Section 6, 45 U.S.C. § 156
E. Section 7 First, 45 U.S.C. § 157 First

III. Rail Passenger Service Act of 1970, 45 U.S.C. § 501, *et seq.* (Excerpt)

A. Section 405(b), 45 U.S.C. § 565(b)

IV. 28 U.S.C. § 1337

I. Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.* (Excerpts)

A. Section 11341(a), 49 U.S.C. § 11341(a)

(a) The authority of the Interstate Commerce Commission under this subchapter is exclusive. A carrier or corporation participating in or resulting from a transaction approved by or exempted by the Commission under this subchapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law,

including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction. However, if a purchase and sale, a lease, or a corporate consolidation or merger is involved in the transaction, the carrier or corporation may carry out the transaction only with the assent of a majority, or the number required under applicable State law, of the votes of the holders of the capital stock of that corporation entitled to vote. The vote must occur at a regular meeting, or special meeting called for that purpose, of those stockholders and the notice of the meeting must indicate its purpose.

B. Section § 11343(a), 49 U.S.C. § 11343(a)

(a) The following transactions involving carriers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I (except a pipeline carrier), II, or III of chapter 105 of this title may be carried out only with the approval and authorization of the Commission:

(1) consolidation or merger of the property or franchises of at least 2 carriers into one corporation for the ownership, management, and operation of the previously separately owned properties.

(2) a purchase, lease, or contract to operate property of another carrier by any number of carriers.

(3) acquisition of control of a carrier by any number of carriers.

(4) acquisition of control of at least 2 carriers by a person that is not a carrier.

(5) acquisition of control of a carrier by a person that is not a carrier but that controls any number of carriers.

(6) acquisition by a rail carrier of trackage rights over, or joint ownership in or joint use of, a railroad line (and terminals incidental to it) owned or operated by another rail carrier.

C. Section 11344(a), 49 U.S.C. § 11344(a)

(a) The Interstate Commerce Commission may begin a proceeding to approve and authorize a transaction referred to in section 11343 of this title on application of the person seeking that authority. When an application is filed with the Commission, the Commission shall notify the chief executive officer of each State in which property of the carriers involved in the proposed transaction is located and shall notify those carriers. If a motor carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title is involved in the transaction, the Commission must notify the persons specified in section 10328(b) of this title. The Commission shall hold a public hearing when a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter is involved in the transaction unless the Commission determines that a public hearing is not necessary in the public interest.

D. Section 11347, 49 U.S.C. § 11347

When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45. Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its em-

ployees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period).

II. Railway Labor Act, 45 U.S.C. § 151, *et seq.* (Excerpts)

A. Section 2 First, 45 U.S.C. § 152 First

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

B. Section 2 Seventh, 45 U.S.C. § 152 Seventh

No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

C. Section 5 First, 45 U.S.C. § 155 First

The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

D. Section 6, 45 U.S.C. § 156

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after

the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences, without request for or proffer of the services of the Mediation Board.

E. Section 7 First, 45 U.S.C. § 157 First

Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in the preceding sections, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: Provided, however, That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise.

III. Rail Passenger Service Act, 45 U.S.C. § 501, *et seq.* (Excerpt)

A. Section 405(b), 45 U.S.C. § 565(b)

Such protection arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and

benefits (including continuation of pension rights and benefits) to such employees under existing collective-bargaining agreements or otherwise; (2) the continuation of collective-bargaining rights; (3) the protection of such individual employees against a worsening of their positions with respect to their employment; (4) assurances of priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of the Interstate Commerce Act. Any contract entered into pursuant to the provisions of this title shall specify the terms and conditions of such protective arrangements. No contract under section 401(a)(1) of this Act between a railroad and the Corporation may be made unless the Secretary of Labor has certified to the Corporation that the labor protective provisions of such contract afford affected employees, including affected terminal employees, fair and equitable protection by the railroad.

IV. 28 U.S.C. § 1337

(a) The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies: Provided, however, That the district courts shall have original jurisdiction of an action brought under section 11707 of title 49, only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interest and costs.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where a plaintiff who files the case under section 11707 of title 49, originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of any interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) The district courts shall not have jurisdiction under this section of any mater within the exclusive jurisdiction of the Court of International Trade under chapter 95 of this title.

APPENDIX F

IN THE MATTER OF ARBITRATION BETWEEN

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

AND

UNION PACIFIC RAILROAD COMPANY
MISSOURI PACIFIC RAILROAD COMPANY

DECISION

File:

Finance Docket No. 30,000

Arbitrator:

Jacob Seidenberg, Esquire

Hearing:

December 13, 1984

Appearances:

Brotherhood of Locomtive Engineers
W.H. Hirst—Vice President
E.E. Watson—Vice President

Carriers

R.D. Meredith—Director Labor Relations—
Union Pacific
R.P. Mitchell—Director Labor Relations—
Missouri Pacific

Post Hearing Briefs Received:

December 29, 1984

Issues:

1). Does Arbitrator have jurisdiction under Section 4, Article I of the ICC imposed New York Dock Conditions to permit Carriers to transfer work from Missouri Pacific RR to Union Pacific and have transferred work performed under the operating rules and collective bargaining agreement between the Union Pacific RR and the BLE?

2). Does the proposed transfer of work constitute a fair and equitable basis for the selection and assignment of forces under a New York Dock transaction?

Background:

The instant dispute has been precipitated as a result of the Interstate Commerce Commission approving on October 20, 1982 the petitions of the Union Pacific RR, the Missouri Pacific RR and the Western Pacific RR to consolidate and create a new railway system.

In the course of effectuating this new railroad network, the affected Carriers sought to achieve certain "common point consolidations". The parties to this dispute reached agreement on seven common points, but were unable, after six conferences, to reach agreement at the following three common points: Salina, Kansas, McPherson, Kansas; and Beloit, Kansas.

On October 30, 1984, the disputants agreed to submit the matter to arbitration, as provided for by Article I Section 4 of the New York Dock Conditions. These Conditions had been imposed by the Interstate Commerce Commission upon the Carriers as protections for the employees of the three Carriers affected by the consolidation.

The parties selected the Undersigned to hear and decide the dispute.

On October 19, 1983, the ICC issued a Decision under Finance Docket No. 30,000 (Sub-No. 18) in response to petitions filed both by the BLE and UTU relative to the Commission's plenary jurisdiction over rail consolidation *vis a vis* the requirements of the Railway Labor Act.

The substantive aspects of the dispute stem from the notices served by the Carriers on the Organization pertaining to the selection and assignment of forces at the three common points, and counter proposals thereto. However, before we can deal with the merits, we must review a procedural objection which the Organization has interposed to the Arbitrator's jurisdiction to consider the dispute.

Organization's Position (Procedural)

The Organization notes that Article I, Section 2 of the ICC prescribed New York Dock Conditions states:

> "2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes."

The Organization maintains that the Carriers seek to avoid their statutory obligation under the Railway Labor Act, not to unilaterally change rates of pay or terms of working conditions, except in accordance with the provisions of Section 6 of the RLA. The Organization specifically protests the Carriers' efforts to get rid of the Local Agreement of August 10, 1946 in effect on the Missouri Pacific as well as other working conditions. The Organization stresses that at each of the three common points the Carriers do not propose to abandon tracks or facilities. It just seeks to substitute Union Pacific

employees and Union Pacific rules for Missouri Pacific employees and Missouri Pacific rules without complying with the RLA requirements.

The Organization asserts the explicit language of Section 2 of Article I, proscribed the Carriers from utilizing Section 4 of Article I as a means to change existing agreements, except by mutual consent. It further asserts that it would be ironic to transmute the New York Dock Conditions from a shield designed to protect employee interests to a sword to deprive employees of their Railway Labor Act protections.

The Organization alludes to several (6) arbitration awards which have found that arbitrators acting under the mandate of Section 4 lack the authority to modify or vitiate existing collective bargaining agreements, in light of the explicit provisions of Section 2. The Organization notes that the Carriers, despite all of the cited awards, did not even request the ICC to overrule these arbitration awards. The Carriers should not be permitted in the instant case to overrule these well reasoned awards.

The Organization notes that the October 19, 1983 ICC clarification has been appealed to the Federal Courts and the appeal is still pending.

Carrier's Position (Procedural)

The Carrier states that since the ICC issued its October 19, 1983 Clarification, the jurisdictional question raised by the Organization is moot and settled. The ICC has held its authority over railroad consolidations is exclusive and plenary, and its approval of a transaction exempts such a transaction from the requirements of all laws including the Railway Labor Act. The Carriers note that the ICC Clarification states:

> "If our approval of a transaction did not include authority for the railroads to make necessary

changes in working conditions, subject to payments of specified benefits, our jurisdiction to approve transactions requiring changes in the working conditions of any employees would be substantially nullified. Such a result would be clearly contrary to congressional intent."

The Carrier maintains that the arbitration awards rendered prior to October 19, 1983, must be deemed to have been superceded by the ICC's Clarification Decision. Since the ICC authored the New York Dock Conditions, its holdings as to the intent and purpose of these Conditions must be deemed superior to any arbitral decisions interpreting the Conditions. The Carriers add the ICC Clarification makes it patently clear that no existing working conditions in a collective bargaining agreement barred the execution of the ICC approved Consolidation.

The Carrier further stresses that since the ICC rendered its Clarification Decision there have been two arbitration awards which held there was jurisdiction in an Article I, Section 4 arbitration proceeding to consider changes in existing collective bargaining agreements.

The Carrier states on the basis of the present record there can be no doubt that this Arbitrator, acting under Section 5, has the jurisdiction and authority to approve the transfer of work from the Missouri Pacific to the Union Pacific and place the transferred work under the operating rules and collective bargaining agreements of the Union Pacific.

Findings: (Procedural)

On the basis of the record before us we conclude that we now have jurisdiction to consider the dispute involving the allocation and assignment of forces through implementing agreements drafted pursuant to New York Dock Conditions, even though these implementing agreements may result in the assigned forces operating under

a different set of operating rules and different labor agreement than the ones under which they formerly functioned.

We find that, despite the weight of arbitral authority that was formerly in effect prior to the ICC October 19, 1983 Clarification Decision, those arbitration awards must now yield to the findings of the Clarification Decision, i.e., that in effecting railroad consolidations the Commission's jurisdiction is plenary and that an arbitrator functioning under Article I, Section 4, of the labor protective conditions, is not limited or restricted by the provisions of any laws, including the Railway Labor Act, and that the arbitration provisions of the New York Dock Conditions are the exclusive procedures for resolving disputes arising under the Consolidation. We find that the interpretation and application of the Commission as to the scope of its prescribed labor conditions in the instant case, has to be given greater weight than an arbitration award also pertaining to the scope of these labor protective conditions.

When we turn to the substantive aspects of the dispute dealing with the three common points, there are three separate and discrete matters which will be treated in considering the proposed implementing agreements.

Salina, Kansas

This point is currently served by both the UP and MP. Both Carriers serve it by freight assignments. The UP also serves it by switch engine assignments, and the MP by a traveling switch engine.

The Carriers now propose to service Salina by a single UP traveling road switcher which will operate within a 50 miles area of Salina under the UP's operating and schedule rules. The MP traveling switcher will be abolished.

The Organization proposes that the Road Switcher shall be operated by MP employees and it will not perform any switching within the switching limits of Salina.

The Carrier also sets forth how road operations will be handled into and out of Salina and off the MP's Salina Division. These proposals are to have UP crews handle traffic routed via UP while MP crews will handle traffic routed via the MP. Employees adversely affected will receive the protection of the New York Dock Conditions.

The Organization stresses that MP engineers will only be able to exercise their seniority on their own seniority district. If they transfer to another seniority district, they would be listed after the most junior employee in that district. The Organization stresses that since the New York Dock Conditions now offer maximum protection for only six years, this does not effectively afford any meaningful protection to younger employees. It urges the work should be prorated on the basis of engine hours or road miles.

Findings:

After reviewing the detailed proposal contained in the draft implementing agreements of the parties attached to their respective Submissions, we conclude that the Carriers Implementing Agreement (attachment No. 1) with its addenda, more effectively achieves the consolidation and coordination of the operations at Salina. We are not at liberty to overlook that the ICC approved the consolidation under the common control of the Union Pacific Railway System. Accordingly, we find that Carriers' Attachment No. 1, dated September 18, 1984, constitutes the appropriate arrangement for the Salina operations and it is to be the implementing agreement for the Salina operation.

McPherson-El Dorado

McPherson is serviced by both the UP and MP. The UP serves McPherson by a local freight assignment operating out of Salina while the MP services it by a local freight assignment operating out of El Dorado. Salina is 35.4 miles from McPherson while El Dorado is 61.7 miles from McPherson.

The Carriers propose to serve McPherson by combining both local freight assignments into a single local to be governed by UP schedule and operating rules. The UP would man the operation for five months and the MP for seven months. The Organization's counter proposal is to apportion the work—36% to UP and 64% to the MP. The Carriers propose Salina to be the home terminal, and the Organization counter proposes that Salina be the home terminal, when the UP engineers are manning the assignment and El Dorado will be the home terminal when MP engineers are protecting the work. The Organization further proposes that when MP engineers operate their alloted proration they will operate under MP rules and MP schedule provisions covering rates of pay and working conditions.

Findings:

We find that the objectives of the coordination and consolidation would be facilitated by the Carriers' proposals as set forth in their Attachment No. 2 attached to Carriers' Submission, with one exception, namely, that when the MP engineers operate the local freight assignment their home terminal should be El Dorado rather than Salina. The great bulk of MP engineers live in the vicinity of El Dorado and there is no persuasive reason why these engineers should travel approximately 90 miles to work that assignment. However, we find that in the interest of uniformity and consistency of operations that the assignment should operate under UP rules rather

than shift back and forth periodically between MP and UP.

Accordingly, we find that Carriers' Attachment No. 2 with its Attachments set forth in its Submission, except as herein amended, shall constitute the implementing agreement to handle the UP and MP traffic between Salina and El Dorado.

Beloit

Beloit is serviced both by UP and MP. The UP services it with local freight assignments operating out of Salina while the MP services it with a local assignment operating out of Concordia. In addition the MP operates several local freight assignments operating west of Frankfort such as:

Atchison-Concordia Local
Concordia-Stockton Local
Down-Lenora Local

The Carriers propose to abolish these listed MP operated Local Assignments and serve Beloit with a consolidated operation to be operated by MP crews because most of the employees living near Beloit are MP employees. The consolidated assignment shall operate, however, under UP rules and schedule provisions.

The Organization contends there is no valid basis to compel MP employees to operate UP rules. The MP employees should be allowed their own rules, rates of pay and working conditions when they function under their allocated proration.

Findings:

We find the allocation of work of Beloit as proposed by the Carriers is fair and reasonable and therefore the description of work set forth in Attachment No. 3, attached to Carriers' Submission, should be governed by the Carriers' proposed implementing agreement.

Accordingly, Carriers' Attachment No. 3 with its attachments shall constitute the implementing agreement to handle operations at Beloit, including the designated territory listed in aforesaid Attachment.

In summary we are aware that any consolidation of rail properties disturbs the status quo and is unsettling to the affected Organization and employees. However, the Interstate Commerce Commission held that the Consolidation here in issue, with the prescribed labor conditions, is consistent with the public interest (366 ICC 619), and it must be accepted disturbing as it may be, even to the extent of doing away with the MP August 10, 1946 Local Agreement. We find that the Carriers have sought to select and assign the forces, in a fair and reasonable manner, and still achieve the efficiency and benefits which were the prime motivations for seeking the Consolidation. We find that conducting all three common point operations under the UP operating rules and schedule rules are not inconsistent with these objectives, since the UP has common control of the consolidation.

We conclude that the approved proposals, as amended, covering the three common points are an appropriate method for the selection and assignment of forces, and should be effected by the prescribed implementing agreements.

Decision:

Pursuant to Article I, Section 4 of the New York Dock Conditions, we find that the implementing agreement set forth in Carriers' Attachment No. 1 shall be the method for selecting and assigning the forces for the Salina operation.

We find further that implementing agreement, as amended, set forth in Carriers' Attachment No. 2, shall be the method for selecting and assigning the forces for the McPherson-El Dorado operation.

We also find that the implementing agreement set forth in Carriers' Attachment No. 3 shall be the method for selecting and assigning the forces in the Beloit operations.

/s/ Jacob Seidenberg
JACOB SEIDENBERG
Arbitrator

January 17, 1985.

APPENDIX G

October 10, 1986

Mr. J. T. Williams
Director of Labor Relations
CSX Transportation Co.
Equipment Group
Baltimore, Maryland

RE: Your notice of August 29, 1986 concerning transfer of Heavy Repair Freight Car work from Waycross, Georgia on the SCL Railroad to Raceland, Ky. on the C&O Railroad. Carrier File No. G-125 Waycross-Raceland DD5 86/08/020.

Dear Mr. Williams:

In regards to the above referenced matter on which we held the initial conference on September 10, 1986, and further conference on October 10, 1986, this is to advise that as a result of our failure to reach agreement on certain issues concerning this matter within 30 days from the date of our initial meeting, that the Organization is hereby serving notice on you, the Carrier, of our intent to submit the matter to arbitration pursuant to Section 4 of the Agreement for Protection of Employees in Event of Merger, dated November 3, 1986, and more commonly referred to as the Orange Book Agreement, as well as Article I, Section 4 of the New York Dock Protective Agreement. This notice being served under both Agreements since the protection of involved claimants, and the unresolved questions, fall partially under one Protective Agreement and partially under the other Protective Agreement.

The Organization designates Mr. R.P. Wojtowicz as the Organizations member of the Arbitration Committee, and, he is available to you immediately for the purpose

of reaching an agreement as to the neutral member of this Arbitration Committee.

The questions at issue in this dispute are contained in my Certified Mail letter to you dated September 2, 1986, and said questions at issue are as follows:

1. Is Carrier's notice dated August 28, 1986, concerning transfer of Heavy Repair Freight Car work from Waycross, Ga. on the SCL R.R. to Raceland, Ky. on the C&O R.R. adequate and specific enough notice (inasmuch as it does not describe the SCL Heavy Repair Work being moved to Raceland, Ky., nor does it describe the position of approximately 22 of our members whose jobs are being abolished) under the Agreement for protection of Employees in Event of Merger, dated November 3, 1966 and commonly referred to as the Orange Book Agreement, as well as the New York Dock Protective Agreement?

2. Can the effected employees who have lifetime guaranteed jobs on the SCL R.R. under the Orange Book Protective Agreement—which Agreement gives the Carrier the right to transfer work and employees from their home point to other points on the SCL R.R.—now be transferred by the Carrier to another point on another Railroad which is not on the property of the former SCL R.R., when the intent and purpose of this Agreement was only to transfer employees from one point to the other on the former SCL property?

3. Can the Carrier move the work contracted in their Working Agreement to the SCL employees out from under this Agreement and place said work under another contract (Working Agreement) when both Assignments are still separate and in effect on the separate properties?

Please promptly advise the name of the Carrier member; and, if the Carrier's member and our member, Mr. R.P. Wojtowicz are unable to agree upon the selection of

a referee within 10 days from the date of this letter, in accordance with Section 4 of the Protective Agreements, we will request that the National Mediation Board appoint a referee in this case.

Very truly yours,

/s/ L. W. McAlpine, Jr.
L. W. McALPINE, JR.,
General Chairman

LWM:bjd

cc: C.E. Wheeler
R.P. Wojtowicz
L.A. Sutton
B.J. Crews

Mr. L. W. McAlpine, Jr., General Chairman
Brotherhood Railway Carmen of the U.S. and Canada
P.O. Box 3744
Savannah, GA. 31404-0244

Mr. Robin Utter, General Chairman
Brotherhood Railway Carmen of the U.S. and Canada
857 McKinley Street
Toledo, Ohio 43605

October 15, 1986

Gentlemen:

This refers to notice dated August 29, 1986, of Carriers' intent to transfer freight car heavy repair work from Waycross, Georgia to Raceland, Kentucky, and Mr. McAlpine's October 10, 1986 letter concerning that notice.

In view of the refusal of the Organization to negotiate an implementing agreement as required by the New York Dock conditions, Carriers' proposal presented to you during conference on October 10, 1986, is hereby withdrawn.

This is notice of Carriers' intent to refer the dispute to an arbitration committee for resolution pursuant to Section 4(a) of Article I of the New York Dock conditions. The question posed by the Carriers shall be:

> "Shall the terms of the attached agreement, proposed by the Carriers, apply to the implementation of the Carriers' August 29, 1986 notice to transfer all freight car heavy repair work from Waycross, Georgia to Raceland, Kentucky and to coordinate such work with that presently being performed at Raceland under the C&O Agreement?"

A copy of the Carriers' proposed implementing agreement to be submitted to the arbitration committee is attached.

The undersigned is designated as the Carrier Member of the arbitration Committee. You are requested to join in the selection of a neutral referee within five days.

Very truly yours,

/s/ J. T. Williams
J. T. WILLIAMS
Director Labor Relations

cc: Mr. R. P. Wojtowicz
Mr. R. Blevins

November 4, 1986

Mr. J. T. Williams
Director of Labor Relations
CSX—Transportation
Equipment Group
100 N. Charles St.
Baltimore, Maryland 21201

RE: Your notice dated August 29, 1986 concerning transfer of freight car heavy repair work from Waycross, Ga. on the SCL R.R. to Raceland, Ky. Carrier File No. G-125 Waycross-Raceland.

Dear Mr. Williams:

In regards to the above referenced matter please be advised that after obtaining a copy of, and thoroughly studying, the decision of I.C.C.'s Financial Docket No. 28905 (Sub-No. 1) CSX CORPORATION—CONTROL—CHESSIE SYSTEM, INC. AND SEABOARD COAST LINE INDUSTRIES, INC., under which your above referenced notice was served, I have found that in this financial docket:

1. "CSX was incorporated for the purpose of this transaction and its present activities are related solely to this transaction.

   "Pursuant to the terms of the proposed merger agreement, Chessie and SCLI will merge into CSX. CSX will thus acquire control of those rail carriers currently controlled by Chessie and SCLI. *The individual railroads under CSX will continue to operate as separate corporate entities within a single railroad system.*" (underscoring ours)

2. The holding Companies were permitted to merge but that the decision of the Commission was that:

"The subsidiary rail carriers will remain as separate corporate entities."

". . . . (traffic must still be interchanged among the affiliated carriers, . . ."

"Chessie is a non-carrier holding company. . . ."

"Under the proposal, only the holding companies (Chessie and SCLI) will merge, creating a new holding company, CSX. The rail subsidiaries will continue to operate as separate entities under the new umbrella. . . ."

"SCLI is also a non-carrier holding company."

3. "Applicants propose a number of projects designed to *coordinate operations at points where the two systems meet.*" (underscoring ours)

"To coordinate the operations of the two systems, applicants have proposed various operational changes. Some of these proposed changes require separate applications."

"Applicants claim that coordinations between the mechanical departments will allow them to achieve cost savings through the expanded use of C&O's Raceland car building facility at Russell, KY, and the expansion of coal car capacity. Applicants plan to use excess capacity at C&O's Raceland facility to *manufacture cars* for Family Lines. C&O will sell these cars to Family Lines at $8,657 below market price. Applicants claim that total savings to the system will be approximately $20.2 million annually." (underscoring ours)

In Appendix E of the Commission's decison, under Paragraph C headed "*Mechanical*" they stated:

"Chessie plans to utilize excess *manufacturing* capacity at its Raceland car shop in Russell, Ky. to construct over a three year period 7,000 coal *hopper cars* for use by Family Lines." (underscoring ours)

"Each railroad will continue to report separately to the Commission, . . ."

4. "We are not prepared, however, to find that the system approach is any less advisable in these circumstances than a wholesale merger of the carriers. A merger could very well present problems not associated with a controlling situation. For example, re-negotiations of labor agreements may be difficult. . . . Were they to discover that a wholesale merger in fact would lead to greater efficiency gains and profits then under the system approach, we think it likely that they would change their plans."

5. "Applicants estimate that the consolidation will actually increase the number of jobs on Chessie and Family Lines railroads, by a net of 276 positions.[62] The bulk of those created, 346 positions will result from the increased production of rail cars at Chessie's Raceland facility in Russell, KY. A number of positions will be abolished under the operating coordinations pursuant to applicants' related applications. *These dislocations, however, are said to be short-lived. It is anticipated that all changes in employee positions will occur within 6 months following final approval of the applications.*" (emphasis ours)

"[62] The transaction involves the transfer of 15 positions, the creation of 446 new positions, the consolidation of 484 positions, and the abolishment of 170 positions. By the end of the third year following consummation, based on 1977 data, total savings from positions abolished are estimated to be $3,935,860, and costs for new positions created are estimated to be $10,531,576."

6. In the findings of the Commission it is stated:

> "(55) No change or modification shall be made in the terms and conditions approved in the authorized applications without the prior approval of the Commission."

From the above quotes and other sections of the I.C.C. decision of Finance Docket 28905 (Sub.-No. 1) it is clearly evident that the approved merger was of the Chessie Systems Inc. and SCL Industries, Inc. which are the holding companies; and that the individual railroads under these holding companies were *not* merged and are still *separate corporate entities.*

In our quote listed as Item No. 1 in this letter it is evident that the only rights given under this merger were those applied for by the holding companies and granted by the I.C.C., and, that the individual carriers cannot now, or at any other time under this Finance Docket expand upon or add to the applied benefits of said document.

Under our Item No. 3 of this letter and other sections of this decision by the I.C.C. they have made it clear that the only coordinations would be where the individual railroad companies meet and have facilities all within one geographical area. Along these lines we wish to point out that Waycross, Ga. on the CSX Transportation Co. R.R. is some 500 miles or more from the nearest property of the C&O R.R. Co. Therefore, nothing in this finance docket or in the Carriers' application made any suggestion or gave the carrier any rights to coordinate work and employees such as is being attempted by your notice dated August 29, 1986.

It is interesting to note that the only work applied for to be done at the Raceland Car Shops at Russell, Ky. and granted by the Commission in this finance docket was that work of *manufacturing new coal hopper cars* for the Family Lines (CSX Transportation Co.) at Raceland;

and, in all other occasions where the Raceland Car Shop is mentioned, it refers only to the building of *new cars.* And, nowhere does it mention or suggest that the holding companies made application for or were granted permission to move heavy repair freight car work from any railroad belonging to the holding companies away from their home shops to the Raceland car building facility.

And, in our Item No. 5 it is clearly pointed out that although the holding companies could have applied for a wholesale merger of all the railroads included in the holding company, they did not do so; and, as pointed out in our quote from the Commission, the individual contracts on each of the individual carriers are still in force and binding upon the individual carriers.

In our Item 5 the I.C.C. has pointed out that there will be a net increase of 276 positions, the bulk of those created, 346 positions, will result from the increased production of rail carriers at Chessie Raceland Facility in Russell, Ky. This increase has been reached-and then some-by the building of new coal hopper cars for the L&N R.R. (CSX Transportation Co.). In this same quoted paragraph it was said that these anticipated changes in employee positions will occur within 6 months following final approval of the applications. We bring to your attention that the proposed move in your notice of August 29, 1986 comes some 6 years or more after the approval by the I.C.C. in this financial docket under which said notice was served.

In our Item No. 6 the carriers are now restricted from making changes such as those contained in the notice of August 29, 1986.

Due to all of the above, this will serve as notice to you that it is our position that even though we filed notice to go to arbitration on the matter in question, that since we have had the opportunity to study the above referred to finance docket and have found that there is nothing in

the Decision of the I.C.C. in Finance Docket 28905 (Sub-No. 1) that gives the carrier the right to serve their notice dated August 29, 1986 and therefore this cannot be considered a transaction under that I.C.C. docket and, therefore, the N.Y. Dock Protective Conditions do not come into play, that this is not a matter which can be arbitrated under the N.Y. Dock Agreement or any other agreement. And, that therefore, if arbitration is continued we intend to challenge the right for this matter to be brought before an arbitrator. Should you insist on continuing with the arbitration as outlined in your letter of October 15, 1986 after you receive this notice, then it will be our position that this is not a proper case for arbitration and therefore our letter to you of October 10, 1986 will be added to to make the following opening statement before the Arbitration Committee:

> "Since there is nothing in the decision of the I.C.C. in Finance Docket 28905 (Sub.-No. 1) that gives the carrier the right to serve their notice dated August 29, 1986, this is not a proper case to be before this arbitration committee, and therefore we request these matters before the arbitration committee be dismissed due to lack of jurisdiction."

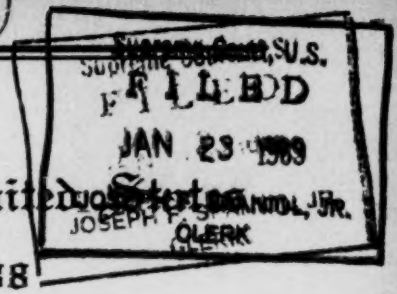
Very truly yours,

/s/ L. W. McAlpine, Jr.
L. W. McALPINE, JR.
General Chairman

LWM:bjd

cc: C.E. Wheeler
R.P. Mojtowicz
R. Utter
L. A. Sutton
B. J. Crews

No. 88-1014



In The

Supreme Court of the United States

October Term, 1988

BROTHERHOOD OF RAILWAY CARMEN, DIVISION OF TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION,
Petitioner,

v.

CSX TRANSPORTATION, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

JAMES S. WHITEHEAD
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THOMAS L. SAMUEL
NICHOLAS S. YOVANOVIC
JAMES D. TOMOLA
CSX TRANSPORTATION, INC.
500 Water Street
Jacksonville, Florida 32202
(904) 359-3674
Attorneys for Respondent

Date: January 23, 1989

Pandick Technologies, Inc., Chicago • (312) 236-0200

QUESTION PRESENTED

Whether a district court has jurisdiction to entertain an action by a rail union seeking to enjoin implementation of an arbitration award to which the union is a party rendered pursuant to labor protective conditions imposed under the Interstate Commerce Act when such award is initially reviewable by the Interstate Commerce Commission and thereafter is judicially reviewable exclusively in the Court of Appeals.

LIST OF PARTIES

The names of all parties to the proceeding are contained in the caption.

CSX Transportation, Inc. (hereinafter "CSXT") is a wholly-owned subsidiary of its parent company, CSX Corporation (hereinafter "CSX").

The subsidiaries and affiliates of CSXT or CSX, other than those wholly owned by them, are as follows:

The Akron Union Passenger Railroad Company;

Allegheny and Western Railway Company;

Augusta and Summerville Railroad Company;

The Baltimore and Cumberland Valley RailRoad Extension Company;

The Baltimore and Philadelphia Railroad Company;

Beaver Street Tower Company;

Central Transfer Railway and Storage Company;

Chatham Terminal Company;

Clearfield and Mahoning Railway Company;

The Cleveland Terminal & Valley Railroad Company;

CSX Services, Inc.;

Dayton and Michigan Railroad Company;

Dayton and Union Railroad Company;

The Home Avenue Railroad Company;

The Lakefront Dock and Railroad Terminal Company;

North Charleston Terminal Company;

Richmond-Washington Company, which has a subsidiary, RF&P Corporation;

Winston-Salem Southbound Railway Company; and

Woodstock & Blockton Railway Company.

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No. 88-1014

In The
Supreme Court of the United States
October Term, 1988

BROTHERHOOD OF RAILWAY CARMEN, DIVISION OF TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION,
Petitioner,

v.

CSX TRANSPORTATION, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent CSX Transportation, Inc. ("CSXT") respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the decision of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The September 19, 1988, opinion of the Court of Appeals is reported at 855 F.2d 745 and appears in the

appendix to the petition ("Pet. App.") at page 1a. The June 16, 1987, order of the United States District Court for the Southern District of Georgia is reported at 662 F. Supp. 1409 and appears at Pet. App. 11a.

JURISDICTION

The judgment of the Court of Appeals was entered on September 19, 1988. Pet. App. 47a. The petition for a writ of certiorari was filed on December 19, 1988. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions pertinent to this case are 49 U.S.C. §§11343 and 11347, and 28 U.S.C. §§2321(a) and 2342(5). The sections from Title 49 are set forth at Pet. App. 49a-52a.

28 U.S.C. § 2321(a) provides:

> Except as otherwise provided by an Act of Congress, a proceeding to enjoin or suspend, in whole or in part, a rule, regulation, or order of the Interstate Commerce Commission shall be brought in the court of appeals as provided by and in the manner prescribed in chapter 158 of this title.

28 U.S.C. § 2342(5) provides:

> The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of-
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> * * *
>
> (5) all rules, regulations, or final orders made reviewable by section 2321 of this title and all final orders of such Commission made reviewable under section 11091(j)(2) of title 49, United States Code.

STATEMENT OF THE CASE

In early 1979, the Chessie System, Inc. ("Chessie"), Seaboard Coast Line Industries, Inc. ("SCLI"), and CSX Corporation, a newly formed holding company, petitioned the Interstate Commerce Commission ("ICC") pursuant to Section 11343 of the Interstate Commerce Act ("ICA"), 49 U.S.C. § 11343, for authorization for CSX Corporation to control the rail subsidiaries of Chessie and SCLI through the merger of Chessie and SCLI into CSX in order to create a single, consolidated rail system. The Chesapeake and Ohio Railway Company ("C&O") was one of the rail subsidiaries of Chessie; the Seaboard Coast Line Railroad Company ("SCL"), subsequently renamed CSX Transportation, Inc. ("CSXT"), was one of the rail subsidiaries of SCLI.

The ICC found the creation of this consolidated system to be consistent with the public interest and approved the petition.[1] Pursuant to 49 U.S.C. § 11347, the ICC, as a condition of its approval, imposed its *New York Dock* labor protective conditions.[2] Those conditions provide income protection to employees affected by the creation of this consolidated rail system and, second, provide a procedure culminating in mandatory arbitration for selecting employees and resolving labor disputes resulting from operational

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[1] *CSX Corporation -- Control -- Chessie System, Inc., and Seaboard Coast Line Industries, Inc. ("CSX--Control")*, 363 I.C.C. 521 (1980).

[2] These so-called *New York Dock* Conditions had been developed by the Commission in an earlier control proceeding involving the New York Dock Railway Co. *See New York Dock Ry--Control-Brooklyn Eastern Dist. Term.*, 360 I.C.C. 60 (1979), *aff'd sub nom. New York Dock Ry* v. *United States*, 609 F. 2d 83 (2d Cir. 1979). Under the *New York Dock* Conditions employees affected by an ICC-approved transaction are entitled to receive up to six years' protection against a resulting loss of income. The *New York Dock* Conditions are set forth in Respondent's Appendix ("CSXT App.") at A-1.

changes by the carriers pursuant to the Commission's consolidation authorization. 363 I.C.C. at 589.[3]

In their short-term operating plan presented to the Commission as part of the application for control authority, the applicants proposed certain operating coordinations and facility consolidations that they planned to implement immediately after receiving the Commission's authority to create the single, consolidated rail system. The consolidation of the CSXT Waycross, Georgia, freight car heavy repair shop and the C&O Raceland, Kentucky, shop was not specifically mentioned. Nonetheless, representatives of rail labor recognized that Commission approval of the control application would allow the carriers to engage in future consolidating activities beyond those specifically contemplated at the time of the original ICC proceedings. Accordingly, those representatives argued to the ICC that such a prospective, long-term impact on rail employees required labor protection more generous than that contained in the *New York Dock* Conditions. 363 I.C.C. at 589.

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[3] Article I, Section 4 of the *New York Dock* Conditions provides an expedited collective bargaining/arbitration mechanism for resolving labor disputes that arise when a carrier, pursuant to the ICC's consolidation authorization, undertakes restructuring actions that may result in the dismissal or displacement of employees. Under Section 4(a), the carrier must give the employees and their unions at least 90 days written notice of the intended transaction. The parties are to begin negotiations within ten days thereafter in an attempt to reach agreement on how the action will be carried out and how the affected employees' interests will be protected. If the parties are unable to reach agreement after bargaining for 30 days, either party may submit the dispute for a binding determination by a neutral arbitrator. Under Section 4(b), the carrier cannot implement the proposed changes until after the parties reach an agreement as a result of their negotiations or the arbitrator's decision resolving the dispute has been rendered. CSXT App. A-3

The Commission agreed that its approval of the control application would empower the CSX system to engage in future facility coordinations and consolidations beyond those then identified. "It is certainly possible that as the two systems mesh their operations, additional coordinations may occur that could lead to further employee displacements." *Ibid.* However, the Commission ruled that its standard *New York Dock* Conditions would adequately protect any employees who might be affected by such future consolidations. "We believe that the standard conditions will adequately protect those employees now identified as affected by the consolidation *as well as those who may be affected in the future*, but are not now identified specifically." *Ibid.* (emphasis added).

On August 29, 1986, as required by the *New York Dock* Conditions, CSXT and C&O served notice upon the Brotherhood of Railway Carmen ("BRC") and its affected members that, as part of the continued consolidation of the operations of the CSX system following *CSX--Control*, the CSXT freight car heavy repair shop in Waycross, Georgia, would be shut down on or about December 31, 1986, and this work would be transferred to the C&O freight car heavy repair shop at Raceland, Kentucky, for consolidation with the work performed there under the C&O/BRC collective bargaining agreement in effect at that location. CSXT and C&O requested the commencement of negotiations with BRC for the purpose of reaching an implementing agreement to carry out the proposed consolidation, as provided in the *New York Dock* Conditions.

No agreement could be reached with BRC in subsequent bargaining sessions. On October 10, 1986, BRC served a notice under the *New York Dock* Conditions, as well as the arbitration clause of the Orange Book Agreement, an existing labor protection agreement,[4] requesting arbitration of several issues,

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[4] This so-called Orange Book Agreement, so named because of

(Footnote continued on the following page)

including whether Waycross carmen covered by the Orange Book Agreement could be required to transfer to Raceland, and whether the carriers could move work covered under the SCL-BRC collective bargaining agreement and place it under the C&O-BRC agreement. CSXT also invoked arbitration under the *New York Dock* Conditions to resolve the dispute over the implementation of the consolidation. The parties subsequently established a three-member arbitration committee and mutually scheduled the arbitration hearing for December 18, 1986.[5]

On December 17, 1986, the day before the scheduled arbitration hearing was to take place, BRC filed the instant lawsuit in the United States District Court for the Southern District of Georgia, purportedly pursuant to the Railway Labor Act ("RLA"), requesting that CSXT be enjoined from applying or enforcing the award that would result from the *New York Dock* arbitration proceedings. CSXT App. A-79, A-90. The arbitration hearing was held as scheduled the next day with BRC's full participation.

On March 23, 1987, the arbitration committee issued its Opinion and Award imposing an implementing agreement to govern the consolidation of the Waycross and Race-

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4 *(Continued from previous page)*
the color of its cover, was entered into effective August 1, 1966,- between various rail unions, including BRC, and two predecessors of SCL in connection with their then pending merger.

[5] Petitioner's description at page 5 of its petition of the events that led up to the arbitration hearing on December 18, 1986, is seriously erroneous and misleading in several respects. It was BRC, not CSXT, that initially demanded arbitration under Article I, Section 4 of the *New York Dock* Conditions, as well as the Orange Book Agreement. See Pet. App. 68A. CSXT and C&O did not insist on arbitration only under *New York Dock*. Indeed, both *New York Dock* and Orange Book issues were fully presented to the arbitration committee, which expressly acknowledged in its award that it was serving in both capacities. CSXT App. A-17. Finally, both BRC and the carriers jointly selected the neutral member of the arbitration committee. He was not obtained by CSXT from the National Mediation Board.

land facilities. CSXT App. A-14. The committee rejected BRC's claim that it lacked authority to provide an implementing agreement for the transfer of work or employees because such transfers allegedly would be in derogation of existing collective bargaining agreements, merger protection agreements, and the Railway Labor Act. The committee recognized that it served as a "quasi-judicial extension" of the ICC because its underlying arbitral authority derived from the ICC's order in *CSX--Control* imposing the *New York Dock* Conditions and that, as a result, it should follow the ICC's interpretation of its own power and of its enabling statute, the Interstate Commerce Act. *Id.* at A-41. The committee recognized that the ICC has declared that ICC-authorized transactions are exempt from the requirements of the Railway Labor Act, to the extent the RLA bargaining procedures conflict with the expedited bargaining/arbitration procedure established by the ICC in its *New York Dock* Conditions. *Id.* at A-41 to A-43. Thus, the committee concluded that, as an agent for the ICC, it possessed the requisite authority to formulate an implementing agreement that would provide for the transfer of both work and employees from Waycross to Raceland. *Id.* at A-43.[6]

Following the issuance of the arbitration award, both the carriers and BRC commenced proceedings before the ICC seeking administrative review of the award. On April 13, 1987, CSXT and C&O filed a Petition for Administrative Review with the Commission seeking review of that portion of the award that prevented CSXT from mov-

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[6] The committee interpreted the Orange Book Agreement as not allowing CSXT to transfer either Orange Book-protected *employees* or their *work* beyond the former SCL property. CSXT App. A-43 to A-45. The committee recognized, however, that, as a result of ICA Section 11341(a), the limitation in the Orange Book on the transfer of *work* "must be subordinated to the Carriers' right

(Footnote continued on the following page)

ing Orange Book-protected employees from Waycross to Raceland.

BRC prayed in its Cross-Complaint for Review of Opinion and Award of Arbitration Committee that the Award "should be set aside as exceeding this agency's jurisdiction." In particular, BRC argued to the Commission that the award had improperly superceded the RLA and collective bargaining agreement rights of the union's members because the exemption from "all other law" found in ICA Section 11341(a) does not apply to the RLA or to collective bargaining obligations. In addition, BRC argued that the arbitration committee had no jurisdiction to resolve the bargaining dispute over the shop consolidation because this consolidation had not been expressly referred to in the proceedings before the Commission in *CSX--Control.*

While these arbitration review proceedings were pending before the ICC, the district court, on June 16, 1987, dismissed BRC's complaint. The court ruled that it had jurisdiction over BRC's Railway Labor Act claims under 28 U.S.C. § §1331 and 1337(a) as well as under 45 U.S.C.§§152 First and Seventh and 156 and under 49 U.S.C. § 11341. The court did not expressly address CSXT's argument that BRC's claims constituted an impermissible collateral attack on the ongoing ICC arbitration review proceed-

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6 *(Continued from previous page)*
to engage in the authorized New York Dock transaction. Otherwise, the Carriers would be effectively thwarted from transferring all the Waycross freight car heavy repair work to Raceland." *Id.* at A-45. Nevertheless, the committee refused to relieve CSXT from the perceived restrictions in the Orange Book on transferring *employees* off the SCL property because the committee found that this limitation "will only slightly impair the transaction while preserving the essence of the Orange Book pursuant to Section 3 of the New York Dock Conditions." *Id.* at A-45. Thus, the committee ruled that CSXT could transfer the work of Orange Book-protected employees but could not compel Orange Book-protected employees themselves to accept Raceland positions. *Id* at A-46.

ings. The court nevertheless ruled that, under ICA Section 11341(a), the proposed Waycross/Raceland shop consolidation was exempted from the application of the RLA and any restraints in the relevant collective bargaining agreements. Pet. App. 21a.

Following the entry of judgment dismissing BRC's complaint, CSXT and C&O implemented the shop consolidation and transferred the freight car heavy repair work and non-Orange Book-protected employees from Waycross to Raceland in accordance with the terms of the Arbitrated Implementing Agreement.[7]

BRC appealed the dismissal of its claims by the district court to the Eleventh Circuit. While the appeal was pending, on June 23, 1988, the ICC served its ruling on the cross-applications filed by the parties with respect to the arbitration award. Pet. App. 23a-46a. The Commission ruled that it had jurisdiction to review the award. Pet. App. 26a. It then upheld the conclusion of the arbitration committee that it had the authority to impose an implementing agreement moving both work and employees to Raceland, despite potentially conflicting provisions of bargaining agreements, the RLA, or the *New York Dock* Conditions themselves. Pet. App. 30a-31a, 35a.[8] BRC's petition seeking review of the Commission's order is now pending before the United States Court of Appeals for the D.C. Circuit, *sub nom. Brotherhood of Railway Carmen* v. *Interstate Commerce Commission*, No. 88-1724.

On September 19, 1988, the Eleventh Circuit rejected BRC's appeal in the purported Railway Labor Act action

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[7] The Commission on June 5, 1987, denied BRC's request for an emergency cease and desist order during the pendency of the ICC review proceedings.

[8] The Commission reversed the arbitration award insofar as it had prevented the carriers from transferring Orange Book-protected employees to Raceland, explaining that, "Once it is

(Footnote continued on the following page)

seeking to enjoin implementation of the arbitration award and vacated and remanded the judgment of the district court with orders that BRC's claims be dismissed for lack of subject matter jurisdiction. Pet. App. 1a-10a. The Court of Appeals did not reach the issue of the interplay between the ICA and the RLA, on which the district court had based its ruling, but instead concluded that BRC's lawsuit was, in effect, an impermissible collateral attack on the ICC arbitration proceedings and award, review of which was ultimately committed to the Court of Appeals under 28 U.S.C. §§ 2321(a) and 2342(5). Pet. App. 8a.

ARGUMENT

THIS CASE DOES NOT PRESENT ANY ISSUES APPROPRIATE FOR REVIEW BY THIS COURT

Contrary to Petitioner's assertions, this case does not present issues of importance to the rail industry or the process of administrative law that need to be resolved by this Court. The decision of the Court of Appeals was merely a routine application of the settled principle of administrative law proscribing collateral attacks on administrative agency orders when Congress specifically has assigned the jurisdiction to review such orders to another court, *i.e.*, the Court of Appeals. Nor does the narrow decision of the Court of Appeals below give rise to an issue as to the interplay between the Interstate Commerce Act and Railway Labor Act as urged by Petitioner. The case below was dismissed for lack of jurisdiction, and no resolution of this RLA-ICA issue was reached. That issue is more appropri-

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8 *(Continued from previous page)*
determined that a proposed transaction is authorized by the Commission . . . , the carrier is permitted to carry out and fully implement the transaction despite potential impediments in existing agreements upon compliance with the provisions for the protection of the rights of employees contained in *New York Dock* or imposed by the Commission upon the involved transaction." Pet. App. 36a.

ately decided on the appeal of the arbitration award that Petitioner has commenced and that is currently pending in the D.C. Circuit. Moreover, Petitioner's assertion of confusion in the law concerning the interplay between the ICA and the RLA is only achieved by a broad lumping together of decisions arising under various diverse sections of the ICA and by ignoring statutory distinctions that those very decisions found relevant and controlling. The narrow decision of the court below is consistent with this Court's prior decisions and does not present any issues of national import or the opportunity to resolve a conflict between the circuits.

1. The decision of the Court of Appeals was merely a routine application of the settled principle of administrative law proscribing collateral attacks on administrative agency orders when Congress has assigned jurisdiction to review agency orders to a particular court. That court's jurisdiction is exclusive and forecloses challenges to such orders in a different forum. Petitioner has available to it through its appeal from the arbitration award a full review of all relevant issues. *See, e.g., Whitney National Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965); *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 334-37 (1958); *Venner* v. *Michigan Central R.R. Co.*, 271 U.S. 127, 130-31 (1926).

As this Court explained in *City of Tacoma*, an agency's actions cannot be attacked in a court other than the statutory review court even on the ground that its actions violate another federal law. 357 U.S. at 334-37. Thus, where, as here, Congress has designated the Court of Appeals to review an agency's actions, "all objections to the [agency's] order. . .must be made in the Court of Appeals or not at all." 357 U.S. at 336. This principle may not be avoided by bringing a civil suit in the wrong forum under the guise of an action to enjoin a party to the agency proceedings from carrying out the actions approved by the agency. As

this Court recently held in *Federal Communications Commission* v. *ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984), "Litigants may not evade this provision [for exclusive Court of Appeals review] by requesting the District Court to enjoin action that is the outcome of the agency's order." *See also Lambert Run Coal Co.* v. *Baltimore & Ohio R.R. Co.*, 258 U.S. 377, 381-82 (1922); *Venner, supra*, 271 U.S. at 130 (Action assailing validity of ICC order and praying that railroad be enjoined from implementing order "is equivalent to asking that the order be adjudged invalid and set aside.").

BRC attempted just such an end run around the statutory review procedures here. In asking the district court to enjoin CSXT from implementing the ICC arbitration award (CSXT App.A-90), BRC was in effect seeking to have the award "adjudged invalid and set aside," in derogation of the exclusive administrative review mechanism established by Congress for ICC orders.

Federal courts have routinely dismissed for lack of jurisdiction collateral attacks on ICC and Civil Aeronautics Board orders brought in the district courts notwithstanding the fact that the plaintiffs have claimed that compliance with such orders would violate the RLA or collective bargaining rights. *See, e.g., Brotherhood of Locomotive Engineers* v. *Boston & Maine Corp.*, 788 F. 2d 794, 799-802 (1st Cir.), *cert. denied*, 479 U.S. 829 (1986); *Augspurger* v. *Brotherhood of Locomotive Engineers*, 510 F. 2d 853, 860 (8th Cir. 1975); *Carey* v. *O'Donnell*, 506 F. 2d 107, 110-11 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975); *Kesinger* v. *Universal Airlines, Inc.* , 474 F. 2d 1127, 1132 (6th Cir. 1973); *Oling* v. *Air Line Pilots Ass'n*, 346 F. 2d 270, 276-77 (7th Cir.), *cert. denied*, 382 U.S. 926 (1965).

Most recently, the D.C. Circuit rejected just such a collateral attack, under circumstances nearly identical to those here, in *United Transportation Union* v. *Norfolk & Western Ry Co.*, 822 F. 2d 1114 (D.C. Cir. 1987) ("*UTU*

v. *N&W*"), *cert. denied*, 98 L. Ed.2d 651 (1988). A rail union filed suit against a railroad, seeking to enjoin the carrier from implementing an arbitration award issued by an arbitrator serving under labor protection conditions imposed by the ICC, on the ground that compliance with the award, which transferred employees from one collective bargaining agreement and carrier to another, would violate the RLA. The D.C. Circuit affirmed the dismissal of the union's claims, based on its recognition that, because the arbitrator derived his authority solely from the ICC order imposing labor protection conditions on the railroad, "[t]he Union's challenge to the arbitral award is a challenge to the Commission's authority, through its delegate, to diminish rights said otherwise to be conferred by the RLA." 822 F. 2d at 1120. The D.C. Circuit held:

> The conclusion that the arbitral award, like the exemption award [ICC order] from which it derives, was functionally an "order of the Commission" within the meaning of 28 U.S.C. § 2321(a) is therefore inescapable. Accordingly, the district court lacked subject matter jurisdiction to entertain the challenge. The proper avenue of appeal is prescribed by 28 U.S.C. §§ 2321(a) and 2342(5). . . .

822 F. 2d at 1120.[9] The court rejected the identical RLA-based jurisdictional arguments made by BRC here, explaining:

> The Union's argument for jurisdiction below rests crucially on the proposition that it is asserting violations of the RLA rather than defects in an order of the Commission. For us to agree, however, would enable a party, merely by drafting an artfully worded complaint, to avoid the bar of a clearly applicable jurisdictional statute. The Union's complaint is with the Commission and the

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[9] BRC does not dispute that the arbitration committee here was operating as a delegate of the ICC pursuant to Article I, Section 4(a) of the *New York Dock* Conditions.

> arbitration it set up. Its theory is that neither the Commission nor its arbitrator can lawfully issue an order that derogates the Union's rights under the RLA, not that they have somehow "violated" the RLA. To view the matter otherwise would be to allow the complainant's own description of its theory to determine the forum with jurisdiction.

Ibid.

Similarly here, BRC's complaint is in reality with the ICC's interpretation of the ICA. BRC, in seeking to enjoin CSXT from putting into effect the results of the arbitration and from complying with the implementing agreement prescribed by the arbitration committee, was in essence asking the district court to review and set aside the arbitration award on the ground that the committee had erroneously interpreted the scope of the authority of the ICC and its delegated agents under the Interstate Commerce Act.

As the instant case demonstrates, the ICC will review the decisions of arbitrators appointed under its prescribed labor protection conditions. *See also Chicago and North Western Transportation Co.--Abandonment--Near Dubuque and Oelwein, Ia.*, 3 I.C.C.2d 729 (1987), *aff'd sub nom. International Brotherhood of Electrical Workers* v. *Interstate Commerce Commission ("IBEW* v. *ICC")*, 129 L.R.R.M. 3017 (D.C. Cir. 1988). The appropriateness of ICC review, in the first instance, has recently been confirmed by the D.C. Circuit in *IBEW* v. *ICC*, *supra*.

It is particularly appropriate that issues such as those raised in the district court by BRC here be considered first by the ICC. BRC's claim that the Waycross/Raceland shop consolidation was not "authorized" by, or within the scope of, the Commission's decision in *CSX--Control* is peculiarly within the expertise of the Commission, the decision's author. Similarly, the claim that the arbitration committee lacked the authority to move people and work from one location and bargaining agreement to another is simply an argument that the committee exceeded the authority

delegated to it by the ICC under, and misinterpreted, the ICA. The Commission, with its expertise in interpreting Congress' statutory intent regarding the ICA, should have the first opportunity to correct any such error, subject to subsequent judicial review in the Court of Appeals. Finally, Congress vested exclusive jurisdiction in the Commission to carry out the nation's transportation policy while at the same time determining the level of labor protection necessary to protect the legitimate interests of affected rail employees. When there are claims that this delicate balance has been disturbed, it is the Commission, and not a district court, that should resolve them and decide what relief, if any, is appropriate; judicial review is then available in the Court of Appeals. 28 U.S.C. §§2321(a), 2342(5).

BRC presented all of its RLA-based arguments challenging the legality of the Waycross/Raceland shop consolidation first to the arbitration committee and then to the ICC, and now may present them to the D.C. Circuit.[10] The D.C. Circuit can grant BRC full relief in the event it determines the Commission and its delegate have erred.

The decision of the Eleventh Circuit prohibiting BRC's collateral attack on the established administrative review process was both consistent with this Court's prior decisions and in keeping with Congress' express directive

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[10] BRC has included the following enumerated issues in its brief to the D.C. Circuit in *Brotherhood of Railway Carmen* v. *Interstate Commerce Commission*, No. 88-1724, filed on January 5, 1989:

> 1. Whether the ICC's and the arbitration committee's conclusion that the immunity provisions of 49 U.S.C. § 11341(a) applied to and relieved CSXT of its contractual and statutory obligations to employees under the Railway Labor Act, 45 U.S.C. §151, *et seq.*, was in excess of ICC statutory jurisdiction and otherwise not in accordance with law?
> 2. Whether the ICC and the arbitration committee in authorizing or approving the "transaction" violated 49

(Footnote continued on the following page)

granting exclusive jurisdiction to the Court of Appeals to review ICC orders. In *UTU* v. *N&W*, *supra*, this Court just last term denied a rail union's petition for a writ of certiorari that presented essentially the same RLA-based jurisdictional arguments made by BRC here. BRC's petition is no more worthy and should also be denied.

2. Petitioner's suggestion that the Court of Appeals' decision is contrary to the Interstate Commerce Act and prior decisions of this Court and the Court of Appeals is erroneous. As noted at page 12, *supra*, the federal courts have consistently rejected collateral attacks on ongoing ICC proceedings, such as the arbitration proceeding here. Neither *Schwabacher* v. *United States*, 334 U.S. 182 (1948), *Seaboard Air Line R.R. Co.* v. *Daniel*, 333 U.S. 118 (1948), nor *McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1944), relied on by BRC, is in any way apposite. *Schwabacher* and *McLean* were actions seeking to enjoin or set aside ICC orders that were properly commenced before a three-judge district court, as then required by Congress. *See* 334 U.S. at 189; 321 U.S. at 68. No issue of jurisdiction arose.[11] *Seaboard* was an action brought in state court

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10 *(Continued from previous page)*

> U.S.C. § 11347 by eliminating "rights, privileges, and benefits . . . [of employees represented by petitioner] under existing collective-bargaining agreements or otherwise" which were required to be preserved by that provision of the Interstate Commerce Act?
>
> 3. Assuming ICC authority to determine to what extent § 11341(a) applied to this case, does the exemption conferred by § 11341(a) from restraining or prohibitory laws apply to actions of a carrier which are not subject to ICC approval under § 11343, or any other provision of the Interstate Commerce Act, and which were not contemplated or brought to the attention of the ICC at the time the control approval order was issued under §§11343(a) and 11344 some six years earlier?

11 This Court in *McLean* did observe, as BRC notes, that Congress did not charge the ICC with the duty or authority to execute laws

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by a rail carrier seeking to enjoin the State of South Carolina from enforcing its corporation laws with respect to an ICC-approved railroad reorganization. This Court had little difficulty in finding that such an action by the beneficiary of an ICC order did not constitute a suit to enjoin, set aside, annul, or suspend the Commission's order; no such relief was sought in the railroad's complaint or the answer. 333 U.S. at 122-23.[12] Thus, none of these cases involved an independent judicial action by a party to an ICC-imposed arbitration proceeding seeking to enjoin another such party from complying with the arbitration award, particularly where the party seeking such relief was simultaneously pursuing review of the award before the ICC and, ultimately, the Court of Appeals.

Nor does the statement in Justice Stevens' concurring opinion in *Interstate Commerce Commission* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270, 96 L. Ed. 2d 222, 247 n.13 (1987), that the "necessity" for the supercession

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11 *(Continued from previous page)*
other than the ICA. 321 U.S. at 79. But, this Court did not rule that, as a result, parties seeking to challenge Commission orders under such other statutes are free to do so in any forum. BRC ignores the fact that in *McLean* this Court explained that, while the policies of these other federal statutes, such as the Sherman Act (or the RLA), are to be considered in varying degrees by the Commission in determining whether the proposed transaction is consistent with the public interest, once that determination has been made, the Commission's order supercedes these other statutes as a result of the predecessor of ICA Section 11341(a). 321 U.S. at 80, 85-88.

12 Similarly, *Brotherhood of Locomotive Engineers v. Chicago & N.W. Ry Co.*, 314 F. 2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963), and *Texas & N.O.R.R. Co.* v. *Brotherhood of Railroad Trainmen*, 307 F. 2d 151 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963), were both district court actions commenced by rail carriers seeking to remove labor obstacles to the implementation of ICC-approved rail transactions, not actions, such as BRC's here, to enjoin the implementation of a Commission order, which can only be brought in the Court of Appeals.

of "other law" provided by ICA Section 11341(a) is to be determined by the "tribunal that is faced with a claim that a party is violating some 'other law,' " condone the collateral attack on the ICC arbitration proceeding mounted by BRC here. Subject matter jurisdiction was never an issue in that case, which arose from a petition for review of an ICC order initially filed in the Court of Appeals under 28 U.S.C. §§2321(a) and 2342(5). The proper tribunal to determine whether the arbitration award here improperly overrode the bargaining agreement or RLA rights of BRC and its members was also initially the Commission and, subsequently, the Court of Appeals, as the Eleventh Circuit properly recognized. Pet. App. 8a.

3. The bulk of BRC's petition is simply an attack on the ICC's determination that the expedited bargaining/arbitration procedure specified in its labor protective conditions supercedes the endless bargaining procedures of the Railway Labor Act[13] and that the ICC or its arbitrator-delegate has authority in imposing implementing agreements to depart from asserted collective bargaining agreement or RLA rights.[14] BRC maintains that rail carriers may not implement transactions authorized by the ICC until they have fully complied with the interminable RLA bargaining process, with the ultimate threat of a strike in the event agreement on the union's terms is not

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[13] This Court has previously recognized that the RLA bargaining process is "purposely long and drawn out," *Brotherhood of Railway Clerks* v. *Florida East Coast Ry*, 384 U.S. 238, 246 (1966), and has described it as "almost an interminable process" and as "virtually endless." *Detroit & Toledo Shore Line R.R.* v. *United Transportation Union*, 396 U.S. 142, 149 (1969); *Burlington Northern R.R. Co.* v. *Brotherhood of Maintenance of Way Employees*, 481 U.S. 429, 95 L.Ed.2d 381, 397 (1987).

[14] *See, e.g., Denver and Rio Grande Western R.R. Co. - Trackage Rights -- Missouri Pacific R.R. Co. -- Between Pueblo, CO and Kansas City, MO*, ICC Finance Docket No. 30,000 (Sub-No. 18)

(Footnote continued on the following page)

reached, even though the carriers are simply implementing the transaction in accordance with the terms of an ICC-required arbitration award. In essence, BRC would have this Court provide rail unions with the same veto power over rail transactions expressly rejected by Congress when it voted down the Harrington Amendment to the Transportation Act of 1940. *See Railway Labor Executives' Ass'n* v. *United States*, 339 U.S. 142, 151 (1950); *Brotherhood of Locomotive Engineers* v. *Chicago & N.W. Ry*, 314 F. 2d 424, 430-32 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963).[15]

This case, in which the provisions of ICA Section 11341(a) expressly apply, in which labor protective conditions have been imposed by the ICC, and in which the carrier has simply implemented an arbitration award expressly contemplated by those conditions, should not be confused with the plethora of "short line" sale cases, such as *Railway Labor Executives' Ass'n* v. *Pittsburgh & Lake Erie R.R.*, 845 F. 2d 420 (3d Cir. 1988), *Trainmencert.*

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14 *(Continued from previous page)*
(served Oct. 25, 1983); *Maine Central R.R. Co., et al. -- Exemption from 49 U.S.C. 11342 and 11343*, ICC Finance Docket No. 30532 (served Sept. 13, 1985), *aff'd sub nom. Railway Labor Executives' Ass'n v. Interstate Commerce Commission*, 812 F. 2d 1443 (D.C. Cir. 1987).

15 The federal courts have long recognized that the RLA is among the "other law" superceded when necessary by the ICA as a result of ICA Section 11341(a). See, *e.g.*, *Brotherhood of Locomotive Engineers* v. *Boston & Maine Corp.*, *supra*, 788 F. 2d at 800-01; *Missouri Pacific R.R. Co.* v. *United Transportation Union*, 782 F. 2d 107, 111-12 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 3209 (1987); *Burlington Northern, Inc.* v. *American Railway Supervisors Ass'n*, 503 F. 2d 58, 62-63 (7th Cir. 1974), *cert. denied*, 421 U.S. 975 (1975); *Brotherhood of Locomotive Engineers* v. *Chicago & N.W. Ry*, *supra*, 314 F. 2d at 430-32; *Nemitz* v. *Norfolk & Western Ry Co.*, 436 F. 2d 841, 845 (6th Cir.), *aff'd on other grounds*, 404 U.S. 37 (1971). *Cf. Interstate Commerce Commission* v. *Brotherhood of Locomotive Engineers*, *supra*, 96 L. Ed. 2d at 244-49 (Stevens, J., concurring).

granted, 57 U.S.L.W. 3376 (Nov. 28, 1988), where the sales transactions at issue were not expressly covered by Section 11341(a)[16] and where the ICC in its discretion declined to impose labor protection conditions. Indeed, Petitioner has not cited a single case in which a federal court has ruled that a rail carrier must comply with the RLA bargaining procedures prior to implementing an ICC-authorized transaction to which Section 11341(a) applies. In contrast, *see Burlington Northern R.R. Co.* v. *United Transportation Union*, 848 F. 2d 856, 863 (8th Cir. 1988), *cert. denied sub nom. Interstate Commerce Commission* v. *United Transportation Union*, 57 U.S.L.W. 3376 (Nov. 17, 1988) ("When the ICA provides a specific exemption from all other law and mandates inescapable employee protective conditions under provisions such as 49 U.S.C. §§11341(a), or 11347, it effectively supersedes. . .the RLA . . . ").

However, this case is not the proper vehicle to address these issues, which were not even reached by the Court of Appeals below. BRC currently has the opportunity to argue and is presenting these arguments to the D.C. Circuit in its review of the ICC order that itself reviewed the Waycross/Raceland arbitration award. If BRC is not satisfied with the decision that court will ultimately issue, it can, and presumably will, present this Court with a petition seeking review of that decision.

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[16] Indeed, the Third Circuit in *Pittsburgh & Lake Erie* expressly noted that ICA Section 11341(a) was not applicable to the rail transaction involved in that case and, accordingly, it was not required to determine the effect of that section on RLA bargaining obligations. 845 F. 2d at 445-46 & n.45.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

RESPONDENT'S APPENDIX

A. *New York Dock* Conditions, from *New York Dock Ry–Control–Brooklyn Eastern Dist. Term.*, 360 I.C.C. 60 (1979) A-1

B. Opinion and Award, *In the Matter of the Arbitration Between Brotherhood Railway Carmen-Division of BRAC, Organization, and CSX Transportation, Inc. and the Chesapeake and Ohio Railway Company, Carriers*, March 23, 1988 . . . . . A-14

C. Verified Complaint for Declaratory Judgment and Injunctive Relief, *Brotherhood Railway, Airline and Steamship Clerks, et al.* v. *CSX Transportation, Inc.*, No. CV 286-243 (S.D. Ga.), filed December 17, 1986 . . . . . A-79

NEW YORK DOCK CONDITIONS

Labor protective conditions to be imposed in railroad transactions pursuant to 49 U.S.C. 11343 *et seq.* [formerly sections 5(2) and 5(3) of the Interstate Commerce Act], except for trackage rights and lease proposals which are being considered elsewhere, are as follows:

1. **Definitions**. - (a) "Transaction" means any action taken pursuant to authorizations of this Commission on which these provisions have been imposed.

(b) "Displaced employee" means an employee of the railroad who, as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working conditions.

(c) "Dismissed employee" means an employee of the railroad who, as a result of a transaction is deprived of employment with the railroad because of the abolition of his position or the loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction.

(d) "Protective period" means the period of time during which a displaced or dismissed employee is to be provided protection hereunder and extends from the date on which an employee is displaced or dismissed to the expiration of 6 years therefrom, provided, however, that the protective period for any particular employee shall not continue for a longer period following the date he was displaced or dismissed than the period during which such employee was in the employ of the railroad prior to the date of his displacement or his dismissal. For purposes of this appendix, an employee's length of service shall be determined in accordance with the provisions of section 7(b) of the Washington Job Protection Agreement of May 1936.

2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

3. Nothing in this Appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such employee may have under any existing job security or other protective conditions or arrangements; *provided*, that if an employee otherwise is eligible for protection under both this Appendix and some other job security or other protective conditions or arrangements, he shall elect between the benefits under this Appendix and similar benefits under such other arrangement and, for so long as he continues to receive such benefits under the provisions which he so elects, he shall not be entitled to the same type of benefit under the provisions which he does not so elect; *provided further*, that the benefits under this Appendix, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits; and,

provided further, that after expiration of the period for which such employee is entitled to protection under the arrangement which he so elects, he may then be entitled to protection under the other arrangement for the remainder, if any, of this protective period under that arrangement.

4. **Notice and Agreement or Decision** - (a) Each railroad contemplating a transaction which is subject to these conditions and may cause the dismissal or displacement of any employees, or rearrangement of forces, shall give at least ninety (90) days written notice of such intended transaction by posting a notice on bulletin boards convenient to the interested employees of the railroad and by sending registered mail notice to the representatives of such interested employees. Such notice shall contain a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes. Prior to consummation the parties shall negotiate in the following manner.

Within five (5) days from the date of receipt of notice, at the request of either the railroad or representatives of such interested employees, a place shall be selected to hold negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this appendix, and these negotiations shall commence immediately thereafter and continue for at least thirty (30) days, Each transaction which may result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4. If at the end of thirty (30) days there is a failure to agree, either party to the dispute may submit it for adjustment in accordance with the following procedures:

(1) Within five (5) days from the request for arbitration the parties shall select a neutral referee and in the event they are unable to agree within said five (5) days upon the selection of said referee then the National Mediation Board shall immediately appoint a referee.

(2) No later than twenty (20) days after a referee has been designated a hearing on the dispute shall commence.

(3) The decision of the referee shall be final, binding and conclusive and shall be rendered within thirty (30) days from the commencement of the hearing of the dispute.

(4) The salary and expenses of the referee shall be borne equally by the parties to the proceeding; all other expenses shall be paid by the party incurring them.

(b) No change in operations, services, facilities, or equipment shall occur until after an agreement is reached or the decision of a referee has been rendered.

5. **Displacement allowances** - (a) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.

Each displaced employee's displacement allowance shall be determined by dividing separately by 12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average

monthly time paid for in the test period), and *provided further*, that such allowance shall also be adjusted to reflect subsequent general wage increases.

If a displaced employee's compensation in his retained position in any month is less in any month in which he performs work than the aforesaid average compensation (adjusted to reflect subsequent general wage increases) to which he would have been entitled, he shall be paid the difference, less compensation for time lost on account of his voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but if in his retained position he works in any month in excess of the aforesaid average monthly time paid for during the test period he shall be additionally compensated for such excess time at the rate of pay of the retained position.

(b) If a displaced employee fails to exercise his seniority rights to secure another position available to him which does not require a change in his place of residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position he elects to decline.

(c) The displacement allowance shall cease prior to the expiration of the protective period in the event of the displaced employee's resignation, death, retirement. or dismissal for justifiable cause.

6. **Dismissal allowances**. - (a) A dismissed employee shall be paid a monthly dismissal allowance, from the date he is deprived of employment and continuing during his protective period, equivalent to one-twelfth of the compensation received by him in the last 12 months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of the transac-

tion. Such allowance shall also be adjusted to reflect subsequent general wage increases.

(b) The dismissal allowance of any dismissed employee who returns to service with the railroad shall cease while he is so reemployed. During the time of such reemployment, he shall be entitled to protection in accordance with the provisions of section 5.

(c) The dismissal allowance of any dismissed employee who is otherwise employed shall be reduced to the extent that his combined monthly earnings in such other employment, any benefits received under any unemployment insurance law, and his dismissal allowance exceed the amount upon which his dismissal allowance is based. Such employee, or his representative, and the railroad shall agree upon a procedure by which the railroad shall be currently informed of the earnings of such employee in employment other than with the railroad, and the benefits received.

(d) The dismissal allowance shall cease prior to the expiration of the protective period in the event of the employee's resignation, death, retirement, dismissal for justifiable cause under existing agreements, failure to return to service after being notified in accordance with the working agreement, failure without good cause to accept a comparable position which does not require a change in his place of residence for which he is qualified and eligible after appropriate notification, if his return does not infringe upon the employment rights of other employees under a working agreement.

7. **Separation allowance**. - A dismissed employee entitled to protection under this appendix, may, at his option within 7 days of his dismissal, resign and (in lieu of all other benefits and protections provided in this appendix) accept a lump sum payment computed in accordance with section 9 of the Washington Job Protection Agreement of May 1936.

8. **Fringe benefits**. - No employee of the railroad who is affected by a transaction shall be deprived, during his protection period, of benefits attached to his previous employment, such as free transportation, hospitalization, pensions, reliefs, et cetera, under the same conditions and so long as such benefits continue to be accorded to other employees of the railroad, in active or on furlough as the case may be, to the extent that such benefits can be so maintained under present authority of law or corporate action or through future authorization which may be obtained.

9. **Moving expenses**. - Any employee retained in the service of the railroad or who is later restored to service after being entitled to receive a dismissal allowance, and who is required to change the point of his employment as a result of the transaction,and who within his protective period is required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects for the traveling expenses of himself and members of his family, including living expenses for himself and his family and for his own actual wage loss, not to exceed 3 working days, the exact extent of the responsibility of the railroad during the time necessary for such transfer and for reasonable time thereafter and the ways and means of transportation to be agreed upon in advance by the railroad and the affected employee or his representatives; *provided however*, that changes in place of residence which are not a result of the transaction, shall not be considered to be within the purview of this section; *provided further*, that the railroad shall, to the same extent provided above, assume the expenses, et cetera, for any employee furloughed with three (3) years after changing his point of employment as a result of a transaction, who elects to move his place of residence back to his original point of employment. No claim for reimbursement shall be paid under the provision of this section unless such claim is

presented to railroad with 90 days after the date on which the expenses were incurred.

10. Should the railroad rearrange or adjust its forces in anticipation of a transaction with the purpose or effect of depriving an employee of benefits to which he otherwise would have become entitled under this appendix, this appendix will apply to such employee.

11. **Arbitration of disputes**. - (a) In the event the railroad and its employees or their authorized representatives cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provision of this appendix, except section 4 and 12 of this article I, within 20 days after the dispute arises, it may be referred by either party to an arbitration committee. Upon notice in writing served by one party on the other of intent by that party to refer a dispute or controversy to an arbitration committee, each party shall, within 10 days, select one member of the committee and the members thus chosen shall select a neutral member who shall serve as chairman. If any party fails to select its member of the arbitration committee within the prescribed time limit, the general chairman of the involved labor organization or the highest officer designated by the railroads, as the case may be, shall be deemed the selected member and the committee shall then function and its decision shall have the same force and effect as though all parties had selected their members. Should the members be unable to agree upon the appointment of the neutral member within 10 days, the parties shall then within an additional 10 days endeavor to agree to a method by which a neutral member shall be appointed, and, failing such agreement, either party may request the National Mediation Board to designate within 10 days the neutral member whose designation will be binding, upon the parties.

(b) In the event a dispute involves more than one labor organization, each will be entitled to a representative on

the arbitration committee, in which even the railroad will be entitled to appoint additional representatives so as to equal the number of labor organization representatives.

(c) The decision, by majority vote, of the arbitration committee shall be final, binding, and conclusive and shall be rendered within 45 days after the hearing of the dispute or controversy has been concluded and the record closed.

(d) The salaries and expenses of the neutral member shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them.

(e) In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee.

12. **Losses from home removal.** - (a) The following conditions shall apply to the extent they are applicable in each instance to any employee who is retained in the service of the railroad (or who is later restored to service after being entitled to receive a dismissal allowance) who is required to change the point of his employment within his protective period as a result of the transaction and is therefore required to move his place of residence:

(i) If the employee owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by the railroad for any loss suffered in the sale of his home for less than its fair value. In each case the fair value of the home in question shall be determined as of a date sufficiently prior to the date of the transaction so as to be unaffected thereby. The railroad shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other person.

(ii) If the employee is under a contract to purchase his home, the railroad shall protect him against loss to the extent of the fair value of equity he may have in the home and in addition shall relieve him from any further obligation under his contract.

(iii) If the employee holds an unexpired lease of a dwelling occupied by him as his home, the railroad shall protect him from all loss and cost in securing the cancellation of said lease.

(b) Changes in place of residence which are not the result of a transaction shall not be considered to be within the purview of this section.

(c) No claim for loss shall be paid under the provisions of this section unless such claim is presented to the railroad within 1 year after the date the employee is required to move.

(d) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under a contract for purchase, loss and cost in securing termination of a lease, or any other question in connection with these matter, it shall be decided through joint conference between the employee, or their representatives and the railroad. In the event they are unable to agree, the dispute or controversy may be referred by either party to a board of competent real estate appraisers, selected in the following manner. One to be selected by the representatives of the employees and one by the railroad, and these two, if unable to agree within 30 days upon a valuation, shall endeavor by agreement within 10 days thereafter to select a third appraiser, or to agree to a method by which a third appraiser shall be selected, and failing such agreement, either party may request the National Mediation Board to designate within 10 days a third appraiser whose designation will be binding upon the parties. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses

of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the compensation of the appraiser selected by such party.

ARTICLE II

1. Any employee who is terminated or furloughed as a result of a transaction shall, if he so requests, be granted priority of employment or reemployment to fill a position comparable to that which he held when his employment was terminated or he was furloughed, even though in a different craft or class, on the railroad which he is, or by training or retraining physically and mentally can become, qualified, not, however, in contravention of collective bargaining agreements relating thereto.

2. In the event such training or retraining is requested by such employee, the railroad shall provide for such training or retraining at no cost to the employee.

3. If such a terminated or furloughed employee who had made a request under section 1 or 2 of the article II fails without good cause within 10 calendar days to accept an offer of a position comparable to that which he held when terminated or furloughed for which he is qualified, or for which he has satisfactorily completed such training, he shall, effective at the expiration of such 10-day period, forfeit all rights and benefits under this appendix.

ARTICLE III

Subject to this appendix, as if employees of railroad, shall be employees, if affected by a transaction, of separately incorporated terminal companies which are owned (in whole or in part) or used by railroad and employees of any other enterprise within the definition of common carrier by railroad in section 1(3) of part I of the Interstate Commerce Act, as amended, in which railroad has an interest, to which railroad provides facilities, or with which

railroad contracts for use of facilities, or the facilities of which railroad otherwise uses; except that the provisions of this appendix shall be suspended with respect to each such employee until and unless he applies for employment with each owning carrier and each using carrier; provided that said carriers shall establish one convenient central location for each terminal or other enterprise for receipt of one such application which will be effective as to all said carriers and railroad shall notify such employees of this requirement and of the location for receipt of the application. Such employees shall not be entitled to any of the benefits of this appendix in the case of failure, without good cause, to accept comparable employment, which does not require a change in place of residence, under the same conditions as apply to other employees under this appendix, with any carrier for which application for employment has been made in accordance with this section.

ARTICLE IV

Employees of the railroad who are not represented by a labor organization shall be afforded substantially the same levels of protection as are afforded to members of labor organizations under these terms and conditions.

In the event any dispute or controversy arises between the railroad and an employee not represented by a labor organization with respect to the interpretation, application or enforcement of any provision hereof which cannot be settled by the parties within 30 days after the dispute arises, either party may refer the dispute to arbitration.

ARTICLE V

1. It is the intent of this appendix to provide employee protections which which are not less than the benefits established under 49 USC 11347 before February 5, 1976, and under section 565 of title 45. In so doing, changes in wording and organization from arrangements earlier developed under those sections have been necessary

to make such benefits applicable to transactions as defined in article 1 of this appendix. In making such changes, it is not the intent of this appendix to diminish such benefits. Thus, the terms of this appendix are to be resolved in favor of this intent to provide employee protections and benefits no less than those established under 49 USC 11347 before February 5, 1976 and under section 565 of title 45.

2. In the event any provision of this appendix is held to be invalid or other wise unenforceable under applicable law, the remaining provisions of this appendix shall not be affected.

ARBITRATION COMMITTEE

In the Matter of the Arbitration Between:

BROTHERHOOD RAILWAY CARMEN - A DIVISION OF BRAC,

Organization,

and

CSX TRANSPORTATION, INC. and THE CHESAPEAKE and OHIO RAILWAY COMPANY,

Carriers.

OPINION AND AWARD

Pursuant to Article I, Section 4 of the New York Dock Conditions and Section 4 of the November 3, 1966 Merger Protective Agreement

I.C.C. Finance Docket No. 28905

Hearing Date: December 18, 1986
Hearing Location: Jacksonville, Florida

MEMBERS OF THE COMMITTEE

Employees' Member: R. P. Wojtowicz
Carriers' Member: J. T. Williams
Neutral Member: John B. LaRocco

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OPINION OF THE COMMITTEE

I. INTRODUCTION

On September 23, 1980, the Interstate Commerce Commission (ICC) approved CSX Corporation's petition to control two non-carrier holding companies: Chessie System, Inc. and Seaboard Coast Line Industries, Inc. ICC Finance Docket No. 28905 (Sub-No. 1). 363 I.C.C. 521 (1980). The Chesapeake and Ohio Railway Company (C&O) and the Baltimore and Ohio Railroad Company (B&O) are the major railroad subsidiaries of Chessie System, Inc. In 1980, Seaboard Coast Line Industries, Inc. was the parent of the Family Lines which included the Seaboard Coast Line Railroad (SCL). The successor enterprises of the Family Lines were Seaboard System Railroad and currently CSX Transportation, Inc. (CSX). The end to end consolidation produced a large single system serving the northeast, southeast and midwest. *Id.* at 553. The railroad subsidiaries remained separate entities. *Id.* at 575. To compensate and protect employees adversely affected by the control case and related proceedings, the ICC imposed the employee merger protection conditions set forth in *New York Dock Railway - Control - Brooklyn Eastern District Terminal*, 360 I.C.C. 60, 84-90 (1979); affirmed, *New York Dock Railway v. United States*, 609 F.2d 83 (2nd Cir. 1979) ("New York Dock Conditions") on all of the involved railroads pursuant to the relevant enabling statute. 49 U.S.C. 11343, 11347; 363 I.C.C. 521, 588.

In 1966, the ICC approved the merger of the Seaboard Air Line Railroad Company (SAL) and the Atlantic Coast Line Railroad Company (ACL). The merged carrier became the SCL.

On November 3, 1966, the Brotherhood Railway Carmen (BRC) and sixteen other rail labor organizations entered into an Agreement with the SAL and ACL for the Protection of Employees in the Event of the SAL-ACL Merger. The Agreement, commonly referred to as the

Orange Book, was effective August 1, 1966. The parties negotiated the Orange Book pursuant to the last sentence of Section 5(2)(f) of the Interstate Commerce Act. In 1978, Congress enacted 49 U.S.C. 11347 and repealed Section 5(2)(f).

II. BACKGROUND AND SUMMARY OF THE FACTS

CSX and C&O (collectively "the Carriers") issued written notice, dated August 29, 1986, of their intent to close CSX's freight car heavy repair shop at Waycross, Georgia and to simultaneously transfer " . . . freight car heavy repair work and certain storeroom work at Waycross . . . " to the C&O's Raceland, Kentucky freight car heavy repair facility. The work moved from Waycros would be " . . . coordinated with such work presently being performed at Raceland under the C&O Agreement." The repair work and Waycross employees are presently subject to the SCL Schedule Agreement. Approximately fifty percent of the employees currently occupying positions at the Waycross repair shop are present employees within the definition set forth in Orange Book Section 2(a).

In their notice, the Carriers informed the Organization of their intent to abolish 149 positions at Waycross and establish 107 positions at Raceland. The Organization represents 121 of the incumbents holding positions slated for abolition. By class, the incumbents are 99 Carmen, 4 Carman Helpers, 13 Painters and 5 Painter Helpers. At the coordinated Raceland facility, the Carriers estimated that they would create 86 Carmen, 3 Carman Helper, 6 Painter and 4 Painter Helper positions to perform the work transferred from Waycross. Except as described above, the notice was silent concerning the 22 workers whose positions would be abolished but would be unable to either obtain an equivalent, newly established Raceland position or exercise their seniority to claim a remaining position at Waycross. The Carriers anticipated that they would close

the Waycross freight car heavy repair shop on or about December 31, 1986.

The notice also indicated that CSX would abolish 3 clerical positions, 11 jobs in the blacksmith's craft, 6 laborer positions, 3 Machinist positions, 4 jobs held by sheet metal workers and 1 electric crane operator position. At Raceland, the Carriers intended to establish only 1 clerical, 4 blacksmith and 3 laborer positions.

After the Carriers served the August 29, 1986 notice, the parties conferred at least twice to negotiate an implementing agreement. Their bargaining efforts were unsuccessful primarily because irreconcilable disagreements developed over the application of certain Orange Book provisions, the interrelationship between the Orange Book and a New York Dock implementing agreement and the Carriers' right to implement the transaction without first complying with the Railway Labor Act. 45 U.S.C. 151 *et seq.* Thereafter, the Organization, and later the Carriers, invoked arbitration in accord with Section 4(a) of the New York Dock Conditions.[1] Even though Section 4 contemplates arbitration by a single, neutral arbiter, the parties formed this Committee to resolve all outstanding disputes under the New York Dock Conditions and the Orange Book. Thus, we derive dual authority from Section 4 of the New York Dock Conditions and Section 4 of the Orange Book.

Beginning on November 4, 1986, the Organization challenged the jurisdiction of this Committee to fashion an implementing agreement. Despite its prior invocation of arbitration, the Organization may nonetheless contest our fundamental power to adjudicate this dispute. A lack of jurisdiction allegation may be raised at any time.

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[1] All sections pertinent to this case are found in Article I of the New York Dock Conditions. Thus, the Committee will only cite the particular section number.

Therefore, the Organization is not estopped from urging this Committee to dismiss all the substantive matters which the parties previously agreed to submit to us.

The Organization and the Carriers filed prehearing submissions and extensively argued their respective contentions at the December 18, 1986 hearing. Also, they filed post-hearing briefs which the Neutral Member received on January 2, 1987. This decision was issued within the thirty day limitation period found in Section 4(a)(3) of the New York Dock Conditions.

III. STATEMENT OF THE ISSUES

The Carriers pose the following question to this Committee:

> "Shall the terms of the attached agreement, proposed by the Carriers, apply to the implementation of the Carriers' August 29, 1986 notice to transfer all freight car heavy repair work from Waycross, Georgia to Raceland, Kentucky and to coordinate such work with that presently being performed at Raceland under the C&O Agreement?"

The "attached agreement" referred to in the Carriers' question at issue is a proposed implementing agreement which it sent to the Organization on October 15, 1986. The Carriers withdrew all their prior proposals.

In its opening submission, the Organization proffered four issues which read:

> **"ISSUE NO. 1:**
>
> "Is the CSX's notice dated August 29, 1986 (attached as Exhibit No. 1), concerning transfer of freight car heavy repair work from Waycross, Ga. on the SCL to Raceland, Ky. on the C&O adequate and specific enough notice under the *New York Dock* conditions?
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> **"ISSUE NO. 2:**
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> "If this arbitrator has jurisdiction of this dispute, can the affected employees who have lifetime

guaranteed jobs on the SSR under the Orange Book agreement–which gives the SSR the right to transfer work and employees only from their home point to other points on the former SAL-ACL railroads–be compelled to transfer to another point on another railroad which is not on the property of the former SCL and ACL railroads without unilaterally effecting a change in their wages, rules or working conditions as set forth in the Orange Book?

"ISSUE NO. 3:

"Can CSX move the work which is subject to the SCL (SSR) Working Agreement and restricted to the SCL employees, out from under the SCL agreement and place it under another contract (Working Agreement) on another railroad?

"ISSUE NO. 4:

"If the above issues each are answered in the affirmative, what should be the terms of an implementing agreement under Article I, Section 4 of *New York Dock*?"

In addition, the Organization's General Chairman on the C&O raised another issue although the question is actually a subset of the above stated fourth issue. The C&O General Chairman presented the following question:

"Shall the C&O employees, junior in seniority to employees transferring from Waycross, Georgia, corresponding [sic] to the number of senior employees transferring to the coordinated operations, be subject to the protective benefits set forth in Article 5 and 6 of the New York Dock Conditions?"

IV. RELEVANT STATUTES, ORANGE BOOK PROVISIONS, EXCERPTS FROM NEW YORK DOCK CONDITIONS AND RECENT COURT DECISIONS

To fully understand the parties' contentions, we must first relate the relevant statutes, contract provisions and legal authority.

The ICC promulgated and imposed the New York Dock Conditions pursuant to the Congressional mandate in Section 11347 of the Interstate Commerce Act. 49 U.S.C. 11347. Starting with Section 1(a), a transaction is " . . . any action taken pursuant to authorizations of this Commission on which these provisions have been imposed." Section 4(a) states that " . . . any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or [arbitrator's] decision under this section 4." [Brackets added for clarification.] 360 I.C.C. 85. Assuming we have jurisdiction, Section 4 empowers this Committee to write an implementing agreement providing for " . . . the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case . . . " *Id.* Also, Section 4 requires the Carriers contemplating a transaction to issue a notice containing " . . . a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes." With regard to its jurisdictional challenge, the Organization relies heavily on Sections 2 and 3 of the New York Dock Conditions. These two sections state:

> "2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.
>
> "3. Nothing in this appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such employee may have under any existing job security or other protective conditions or arrangements; *provided*, that if an employee otherwise is eligible for protection under both this appendix and some other job security or other protective

conditions or arrangements, he shall elect between the benefits under this appendix and similar benefits under such other arrangement and, for so long as he continues to receive such benefits under the provisions which he so elects, he shall not be entitled to the same type of benefit under the provisions which he does not so elect; *provided further*, that the benefits under this appendix, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits; and, *provided further*, that after expiration of the period for which such employee is entitled to protection under the arrangement which he so elects, he may then be entitled to protection under the other arrangement for the remainder, if any, of this protective period under that arrangement."

Section 3 (a) of the Orange Book reads:

"*In consideration of the foregoing employee benefits the Merged Company shall*, subject to compliance with the provisions of Appendix F attached hereto, *be entitled to transfer the work of the employees protected hereunder throughout the merged or consolidated system and the labor organizations will*, subject to provisions contained in the Memorandum of Understanding attached hereto as Appendix G, *enter into implementing agreements providing for the transfer and use of employees and allocation or rearrangement of forces made necessary by changes for which protection is herein provided* and the employees, their organizations and the Carriers will cooperate to that end." [Emphasis added.]

The pertinent portion of Section 11341 (a) of the Interstate Commerce Act provides that a carrier or person participating in an approved transaction " . . . is exempt from the antitrust laws and from all other law . . . as necessary to let that person carry out the transaction . . . " 49 U.S.C. 11341(a). In *Denver and Rio Grande Western Railroad Co. - Trackage Rights - Missouri Pacific Railroad Co.*, Finance Docket No. 30000 (Sub-No. 18) (October 19, 1983) (unreported) ("the *DRGW* Case"), the ICC interpreted the

scope of its Congressionally delegated authority pursuant to Section 11341 (a). The Commission asserted: "Our approval exempts such a transaction from the requirements of all laws as necessary to permit the transaction to be carried out, and includes an exemption from the requirements of the . . . " Railway Labor Act. *DRGW* at 5. The ICC observed that if its approval of a transaction " . . . did not include authority for the railroads to make necessary changes in working conditions, subject to payment of specified benefits, our jurisdiction to approve transactions requiring a change in working conditions of any employees would be substantially nullified." *DRGW* at 6. The ICC ruled that a duly approved trackage rights agreement containing crew assignments was paramount to conflicting terms in the schedule labor agreements.

The District of Columbia Circuit Court of Appeals reversed the ICC's decision. *Brotherhood of Locomotive Engineers v. Interstate Commerce Commission*, 761 F.2d 714 (D.C. Cir. 1985); cert. granted _ U.S. _ (1986). While recognizing that Congress granted the ICC broad powers to exempt transactions from legal obstacles, the Court ruled that the ICC must justify the exercise of its statutory authority. The case is currently pending before the United States Supreme Court.

V. THE POSITIONS OF THE PARTIES

A. The Organization's Position on Jurisdiction

The Organization strenuously argues that we lack jurisdiction to fashion an implementing agreement which changes the rules and working conditions in existing collective bargaining and job security agreements. Section 2 of the New York Dock Conditions bars the Carriers from utilizing the compulsory interest arbitration mechanism in Section 4 to remove either employees or work from the SCL Agreement and place the work or workers under the C&O agreement without exhausting the notice and collec-

tive bargaining requirements in the Railway Labor Act. 45 U.S.C. 151, 156. Neither the ICC nor a Section 4 arbitrator can bind the Organization absent its consent.

The Organization reviewed the history of employee protection in the railroad industry. The historical record evinces a consistently strong public policy favoring employee protection as the consequence of streamlining the national rail transportation network. The Organization emphasizes that the New York Dock Conditions, like all employee protective arrangements, are imposed on carriers for the sole benefit of their workers. If Section 4 of the New York Dock Conditions becomes a subterfuge for inflicting mandatory, binding interest arbitration on employees and their representatives contrary to Sections 6 and 7 of the Railway Labor Act, the employee protection is irrationally twisted into a formidable weapon for, instead of an obligation on, rail carriers. Railroads will routinely resort to Section 4 to unilaterally fix rates of pay, rules and working conditions. Needless to say, such a result compoletely undermines collective bargaining. Pursuant to express statutory provisions, interest arbitration in the railroads has always been voluntary. 45 U.S.C. 157, First. Arbitrators acting under the ICC's New York Dock Conditions lack the power to change or vitiate existing labor contracts.

Before and immediately after the formulation of the New York Dock Conditions, the ICC and arbitrators uniformly ruled that they lacked jurisdiction to alter the terms of collective bargaining agreements within the context of promulgating an implementing agreement to govern the effectuation of an ICC approved transaction. *NW/IT v. RYA/UTU*, NYD § 4 Arb. (Sickles, 1981); *NW/IT v. BLE/UTU*, NYD § 4 Arb. (Zumas, 1982); *NW/IT v. UTU*, NYD § 4 Arb. (Edwards, 1981); and *B&O v. BMWE*, NYD § 4 Arb. (Seidenberg, 1983). Any other outcome would render Section 2 of the New York Dock Conditions

meaningless. More particularly, the ICC never claimed authority to indefinitely supersede the Railway Labor Act far into the future merely because it, at one time, imposed employee protective conditions on a railroad. *Southern Railway Co. - Control - Central of Georgia Railway Co.*, 331 I.C.C. 151, 169-170 (1967); and *Texas and New Orleans Railroad Co. v. Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962). After the ICC's decision in the *DRGW* case, arbitrators overruled the prior line of decisions and held that they had authority to amend or nullify collective bargaining agreements and, in the extreme, to change representation. The issue is before the Supreme Court. At the specific request of the carrier-applicants in the *DRGW* case, the ICC expressly approved a trackage rights agreement containing crew assignment provisions at odds with existing collective bargaining agreements. In its brief to the Court, which is the ICC's latest pronouncement on its exemption authority, the ICC limited its claimed preemption over the Railway Labor Act. In footnote 17 on page 25 of its opening brief, the Commission wrote, "The Section 11341 (a) exemption applies, of course, to terms comprehended by the Commission's approval order." So, the ICC has now informed the Supreme Court that it seeks to supersede the Railway Labor Act only to the extent that it approved specific, future projects which the carrier-applicants presented to it during the course of the administrative proceeding. The transfer of work and workers from Waycross to Raceland was not placed before the ICC as part of the control application. On the contrary, the ICC, relying on the Carriers' representations, opined that the merger of the two holding companies would cause only short-lived employee displacements. 363 I.C.C. 521, 589. The ICC observed that, "It is anticipated that all changes in employee positions will occur within 6 months following final approval of the applications." *Id.* Again, the Carriers led the ICC to believe that "perceptible dislocations" will be necessary only " . . . at points where the . . . end-to-end systems meet . . . " Waycross is approximately 600 miles

from Raceland and almost 500 miles from the nearest C&O point. Without doubt, the ICC did not foresee the Carriers' misguided attempt to coordinate work at two distant shops on two separately operated rail subsidiaries. The Carriers conveniently ignore the differences between the merger of two holding companies and the full scale merger of the subsidiaries. Since the subsidiaries are separate companies, the Carriers may only effect their proposed coordination pursuant to the terms of the Washington Job Protection Agreement. Inasmuch as the Carriers did not present the instant coordination to the ICC, jurisdiction accrues to this Committee only after the Carriers fully comply with the Railway Labor Act.

Similarly, this Committee may not entertain any changes in the Orange Book inasmuch as that merger protective agreement vests covered employees with lifetime employment on the former SCL property. Section 3 of the New York Dock Conditions absolutely preserves workers' rights and benefits under existing protective agreements. The ICC has never even hinted that its approval of a transaction abrogates prior employee protective contracts especially when those agreements, like the Orange Book, were negotiated in conjunction with the ICC's imposition of employee protection as a condition precedent to consummating an earlier merger. Since the ICC has never ruled that its orders prevail over the types of contracts listed in Section 3 of the New York Dock conditions, the Carriers cannot use Section 4 to compel the BRC to surrender Orange Book benefits.

Finally, the Organization may, at its discretion, negotiate implementing agreements which modify existing agreements. The Carriers cannot force the Organization to change the existing collective bargaining agreements in this case merely because, a few times in the past, the Organization voluntarily reached implementing agreements with the Carriers.

Raising an alternative jurisdictional consideration, the Organization avers that the Carriers' August 29, 1986 correspondence failed to satisfy the Section 4 notice requirements for two reasons. First, the notice was vague as to both employees and work. The notice failed to describe exactly what freight car heavy repair work was going to Raceland. Although the Carriers were creating 22 fewer positions at Raceland than they were eliminating at Waycross, they did not give any indication as to the status of the 22 employees who would be detrimentally affected by the transaction. Second, BRC's C&O General Chairman was skeptical of the Carriers' estimated need for 99 Raceland positions to perform the work moved from Waycross. Furthermore, he was particularly wary of the Carriers' intent to bring more employees into Raceland inasmuch as the C&O furloughed more than 200 Raceland Carmen on November 28, 1986. An improper Section 4 notice deprives this Committee of jurisdiction and the case must be dismissed. The Carriers must initiate the Section 4 process *de novo*, by tendering a new notice which fully and adequately describes their proposed changes including an accurate estimate of workers needed to perform the transferred work.

B. The Carriers' Position on Jurisdiction

At the onset, the Carriers underscore the rational business purpose of the coordination. Shippers' demand for conventional type freight cars is diminishing. They are opting for privately owned cars or intermodal equipment. While Raceland Shop is plagued with excess capacity, the Waycross facility lacks the space to assume repair work from Raceland unless CSX expends enormous sums to expand and renovate the plant. Since both shops will not be needed in the future, the Carriers chose to close the Waycross repair facility and transfer the work to Raceland.

During oral argument, the Organization conceded that the planned Waycross-Raceland coordination was a trans-

action within the ambit of the New York Dock Conditions. Admittedly, the Carriers did not specifically present the instant coordination to the ICC but all parties as well as the ICC realized that the railroads might engage in transactions other than those alluded to in their initial operating scheme long after the ICC's omnibus approval of the control application. The Commission remarked that it is "... possible that as the two systems mesh their operations, additional coordinations may occur that could lead to further employee displacements." 363 I.C.C. 521, 589 (1980). In his affidavit, the General Counsel of the Brotherhood of Maintenance of Way Employees realized that approval would eventually permit extensive future changes not needing ICC approval. The Commission responded to labor's concerns by imposing the New York Dock Conditions on each and every transaction. As the ICC found, the "... conditions will adequately protect those employees now identified as affected by the consolidation as well as those who may be affected in the future, but are not now identified specifically." *Id.* Most importantly, the ICC concluded that the operation of a single system would permit the Carriers to reap operating and cost efficiencies including the alleviation of excess capacity at the C&O's Raceland facility. *Id.* at 538 and 561.

The Organization's position that this Committee lacks jurisdiction to formulate an implementing agreement covering the coordination of work between Waycross and Raceland is inconsistent with its past participation in consolidations which the Carriers undertook pursuant to the control case and in accord with arbitrated implementing agreements. See *BRC v. B&O*, NYD § 4 Arb. (Fredenberger, 1984); *C&O v. BRC*, NYD § 4 Arb. (Marx, 1984); and *BRC v. B&O*, NYD § 4 Arb. (Fredenberger, 1983). Jurisdiction was not an issue in any of these three prior Section 4 arbitrations manifesting the Organization's recognition that the sole purpose of Section 4 is to procure an implementing agreement covering the transaction.

The jurisdictional issue presented to this Committee is not a question of first impression. Many respected neutrals have ruled that, under Section 4 of the New York Dock Conditions, an arbitrator has the power to issue an implementing agreement governing a work transfer even though the transaction had not been anticipated during the ICC proceedings and implementation would override terms of existing collective bargaining agreements. *UP v. ATDA*, NYD § 4 Arb. (Fredenberger, 1984); *UP v. UTU*, NYD § 4 Arb. (Brown, 1985); *BLE v. UP/MP*, NYD § 4 Arb. (Seidenberg, 1985); and *UTU v. NW/SR*, NYD § 4 Arb. (Ables, 1985). In *UP v. ATDA*, *supra* at 12, Arbitrator Fredenberger relied on the *DRGW* case and concluded that " . . . the ICC . . . determined that the Railway Labor Act and existing collective bargaining agreements must give way to the extent that the transaction authorized by the Commission may be effectuated." When it approved the CSX control application, the ICC necessarily authorized the transfer of work from one carrier to another as the inevitable consequence of implementing a transaction. If the Organization prevails, it would achieve its objective of thwarting all transactions. Such an outcome effectively cancels the ICC's approval in the control case. The Carriers would be precluded from ever obtaining the savings and benefits of operating a single rail system. In the *DRGW* case at page 5, the ICC emphasized that its " . . . approval exempts a transaction from the requirements of all laws as necessary to permit the transaction to be carried out, and includes an exemption . . . " from the Railway Labor Act. See also, *Brotherhood of Locomotive Engineers v. Chicago & North Western Railway Co.*, 314 F.2d 424 (8th Circ. 1963), cert. den., 375 U.S. 819 (1963). Continuing on the next page of its decision, the ICC squarely rejected the Organization's inference that its ruling conflicted with Section 2 of the New York Dock Conditions when it declared:

> "The terms of those conditions, however, must read in conjunction with our decision authorizing

> the involved transaction and the underlying statutory scheme. To the extent that existing working conditions and collective bargaining agreements conflict with a transaction which we have approved, those conditions and agreements must give way to the implementation of the transaction."

The Organization employs wishful thinking when it asserts that the ICC subsequently modified its view of its own authority when the *DRGW* case reached the Supreme Court. The footnote which the Organization cites from the ICC's brief is attached to an unequivocal sentence reading: "The scope of the exemption is defined by the terms of the approved transaction." The ICC's brief provides little solace for the Organization. In its Reply Brief filed with the Court, the ICC vigorously asserted that provisions of the Railway Labor Act and collective bargaining contracts are automatically superseded to the extent necessary to carry out approved transactions. The ICC knew, as stated in its brief, that if the Carriers first had to endure the protracted negotiating procedures, with the right of economic self-help, contained in the Railway Labor Act, the transaction would be indefinitely delayed and most probably nullified. Thus, mandatory arbitration under Section 4 of the New York Dock Conditions insures that the parties will arrive, through either negotiation or arbitration, at an implementing agreement. Section 4 obviates the "... risk of non-consummation as a result of the inability of the parties to agree on new collective bargaining agreements effecting changes in working conditions necessary to implement these transactions ... " *Maine Central Railroad Co., Georgia Pacific Corporation, Canadian Pacific Ltd. and Springfield Terminal Railway Co. - Exemption From 49 U.S.C. 11342 and 11343*, I.C.C. Fin. Docket No. 30532 (August 22, 1985); appeal pending No. 85-1636 (D.C. Cir.).

All Carmen, who transfer from Waycross to Raceland, must be placed under the C&O Agreement to necessarily effectuate the coordination. And, the transaction cannot be consummated unless the Waycross freight car heavy repair work is shifted to the coordinated facility.

On December 30, 1980, the Organization entered into an implementing agreement providing for the transfer of SCL Carmen's work to the C&O. To reiterate, the Organization acknowledged that, as a consequence of accomplishing the transaction, Carmen may be removed from the SCL Agreement and placed under the C&O Agreement. In addition, the Carriers stress that they successfully negotiated implementing agreements covering this particular transaction with four of the six other labor unions representing affected Waycross employees. As to the two unions which have not signed implementing agreements, the unresolved issues are unrelated to the Carriers' right to transfer workers from Waycross to Raceland.

The Organization has the misplaced notion that the Carriers desire, through this Section 4 arbitration, to vitiate the Orange Book and schedule Agreements. After implementation, the SCL working Agreement and the Orange Book will remain viable and unaltered. Orange Book protected employees moving to Raceland will retain the full spectrum of benefits in the Orange Book.

In summary, this Committee has the jurisdiction to prepare an implementing agreement so that the Carriers may consolidate the work at Raceland. The exemption from the Railway Labor Act is coextensive with the ICC's approval in the control case.

With regard to the sufficiency of the Carriers' August 29, 1986 notice, the document disclosed exactly what changes were forthcoming and included an estimate of the number of employees, in each class, affected by the planned changes. The notice described the relevant Waycross work, noted the Waycross positions to be abolished

and the Raceland positions to be established, and informed the Organization of CSX's intent to close the Waycross facility. The plain, obvious fact was that the 22 employees (directly affected by the coordination) would be protected under the New York Dock Conditions. The notice contained sufficient details to permit the Organization to discuss the impending changes. None of the other labor organizations (which represent members affected by the transaction) challenged the adequacy of the notice. The Neutral Member of this Committee has previously ruled that the adequacy of Section 4 notices must be adjudged on a case by case basis. *C&O/L&N v. BRS*, NYD § 4 Arb. (LaRocco, 1985). The notice in this case is even more specific and informative than the notice tendered in the above case and thus, it conformed to Section 4 of the New York Dock Conditions.

C. The Carriers' Position on the Contents of an Implementing Agreement

During negotiations, the Carriers offered the BRC more generous terms than the minimum level of benefits contained in the New York Dock Conditions. However, the Carriers' offer was conditioned on expeditiously consummating an agreement without resorting to arbitration. When negotiations reached impasse, the Carriers withdrew their offer and substituted the proposed October 15, 1986 implementing agreement. This Committee should disregard the Carriers' withdrawn proposals to encourage the Organization to reach negotiated settlements on future transactions. In addition, a Section 4 Arbitrator lacks the authority to write an implementing agreement which grants workers benefits greater than those specified in the New York Dock Conditions.

Immediately upon notification of the impending transaction, the Organization took the novel position that Orange Book protected workers could not be transferred to Raceland. Contrary to the Organization's bold assertion,

there is no language in the Orange Book prohibiting the Carriers from moving Orange Book protected employees to points beyond the boundaries of the former SCL property. Since 1966, none of the labor organizations which are parties to the Orange Book, including the BRC, have even suggested that the Carriers may only transfer Orange Book covered employees to other SCL locations. If any labor organization had taken such an untenable position, the issue would certainly have been adjudicated long ago. Orange Book Section 3(a) permitted the Carriers to transfer Orange Book employees throughout the former SCL system and concomitantly required the Organization to negotiate implementing agreements governing the force rearrangements. The Organization cannot, twenty years later, convert an affirmative right flowing to the SCL into a restriction on the Carriers' right to move Orange Book employees beyond the former SCL property.

By already signing implementing agreements, other labor organizations involved in this coordination recognize the Carriers' right to require Orange Book protected employees to transfer to Raceland with their work. Moreover, the current BRC General Chairman was not in office when the Orange Book was signed. His predecessor was privy to Orange Book negotiations. The former General Chairman implicitly acknowledged that Orange Book protected employees could be transferred to other than SCL points because he entered into implementing agreements providing for such transfers. The Seaboard System Railroad's former Executive President, who is also familiar with both negotiating and applying Orange Book provisions, confirmed that the parties never intended to grant Orange Book protected workers insulation from transfers to locations other than those on the former SCL property. The retired Executive Vice President further attested in Paragraph 12 of his December 8, 1986 affidavit:

> "12. From my familiarity with the negotiations leading to the agreement known as the Orange

> Book, there was a 'give and take' whereby certain working life income guarantees were granted by the merging railroads in exchange for the right of the merged carrier, SCL, to transfer work, consolidate facilities, and thereby transfer employees pursuant to implementing agreements to be negotiated thereunder."

The Orange Book was negotiated in an atmosphere replete with railroad mergers. The Orange Book drafters could easily foresee that there would be additional mergers necessitating SCL employees to relocate on the expanded property of a successor employer.

The parties have never accorded Orange Book covered employees the absolute right to remain on the SCL property. Pursuant to a December 30, 1980 implementing agreement, SCL Carmen, including Orange Book employees, transferred to the C&O. Six SCL Carmen, three of whom came under the Orange Book, shifted to the C&O and continued to enjoy Orange Book protection. In 1967, shortly after the Orange Book was signed, the Organization was a party to an implementing agreement providing for the transfer of SCL Carmen to the Richmond, Fredericksburg and Potomac Railroad. In 1973, the BRC along with other shop craft unions entered into an implementing agreement covering the coordination of SCL and Louisville & Nashville Railroad (L&N) shop facilities in Alabama. Other labor unions have also entered into implementing agreements requiring Orange Book protected workers to transfer off the SCL. Some Orange Book employees opted for a separation allowance per Orange Book Appendix G.

The Organization is again attempting to forever block the transaction by arguing that the transfer would place workers in a worse position, as specified in Orange Book Section 2(b), due to weather differences between Raceland ("harsh") and Waycross ("mild"). The contention is ludicrous. Greater weather variations can be expected vis-a-vis Miami, Florida and Richmond, Virginia yet, even the

Organization concedes that the Orange Book allows transfers between these two SCL points.

The Organization's proposed implementing agreement terms go far afield of the New York Dock Conditions and would render the transaction so expensive as to effectively prevent implementation. The Organization proposes that all Carmen may decline Raceland positions and, upon their voluntary furlough, still collect Orange Book benefits or New York Dock dismissal allowances. The Carrier would not only be burdened with paying expensive protection benefits but also would have to pay Raceland employees to perform Waycross work. The BRC General Chairman on the C&O seeks to automatically certify an unspecified number of Raceland employees even though dovetailing seniority does not constitute a *per se* adverse effect on junior Raceland Carmen. Whether or not any Raceland workers are eligible for New York Dock payments is best left to a Section 11 proceeding. In the control case, the ICC rejected labor's requests to prohibit residence changes and to enact a conclusive presumption as to adverse effect. 363 I.C.C. 589-590. Another Organization proposal might be inequitably construed to allow senior, furloughed Raceland Carmen to immediately displace junior workers who just followed their work from Raceland. Finally, the SCL General Chairman inappropriately urges utilization of furloughed Waycross Carmen ahead of Raceland employees. Not surprisingly, both the Carriers and the Organization's C&O General Chairman oppose this proposal.

On the other hand, the Carriers' proposed implementing agreement follows the New York Dock Conditions. Forced assignments at Raceland should be made in seniority order consistent with an employee's duty to exercise seniority over his work to the fullest extent. Once the transaction is implemented, there is no reason for the transferred workers to retain seniority at Waycross. The

Carriers request the Committee to adopt their October 15, 1986 proposed implementing agreement.

D. The Organization's Position on the Contents of an Implementing Agreement

The Orange Book clearly and unambiguously affords covered workers lifetime job protection on the SCL. The only exceptions are found in Orange Book Section 2(e). Section 3(a) permits work transfers on the ACL-SAL consolidated system but no further. Transferring Orange Book employees beyond the SCL property places them in a worse position with respect to their working conditions. See Orange Book Section 2(b). The intent and language of the Orange Book demonstrates that covered employees received guaranteed jobs on the former SCL property throughout their worklife. The Orange Book protection is shielded by Section 3 of the New York Dock Conditions and Orange Book protected employees have the right to elect Orange Book benefits as soon as they are affected by a New York Dock transaction. *SSR v. BRAC*, NYD § 4 Arb. (Zumas, 1983). Thus, they are entitled to opt for protective benefits and decline to transfer to Raceland.

The Carriers are unable to point to any Orange Book provision giving the Carriers the unilateral right to move Orange Book employees to the C&O property. On the contrary, Section 3(a) sets the limits of the Carriers' right. Moreover, the terminology regarding seniority in Section 2(e) refers to ". . . existing rules or agreements." Those rules, which are found in the agreements in effect at the time of the merger, provide for point seniority. For the same reasons, the classification of work rule in the January 1, 1968 schedule Agreement preserves the Waycross freight car heavy repair work to the Carmen's craft on the SCL. The Carriers' proposed implementing agreement would abrogate the Orange Book and the then existing working agreement.

At one time (in 1980), the Organization voluntarily entered into an implementing agreement allowing the Carriers to transfer SCL employees, including some Orange Book protected workers, from the SCL property at Richmond to a C&O facility in the same city. The Organization's voluntarism is not precedent for the wholesale removal of all Orange Book protected employees from the SCL. In contrast to the instant transaction, the Orange Book employees were not required to change their residence. The Carriers cannot compel the Organization to execute a similar implementing agreement under the guise of the New York Dock Conditions. The Organization's voluntary action was non-precedential. Although other labor organizations signed implementing agreements to govern this transaction, none (or at most one) of their members, who are involved in this transaction, enjoy Orange Book protection.

The Raceland weather is much more severe than at Waycross. Many of the Waycross Carmen work outdoors. Moving to a harsher working environment constitutes a change in working conditions which is prohibited by Section 2 of the New York Dock Conditions.

Besides provisions keeping Orange Book protected employees on the former SCL property and guaranteeing these workers an election of benefits at the time this transaction is effectuated, the implementing agreement should contain terms close to the implementing agreement originally proposed by the Carriers. The Carriers' October 15, 1986 proposal is grossly inferior to their prior offer. The Carriers are improperly penalizing the Organization for sincerely raising other issues, such as Orange Book interpretation, which directly impacted on the negotiations over an implementing agreement.

The BRC advocates the following changes to the Carriers' October 15, 1986 proposal. First, forced assignments to unfilled Raceland positions should be accomplished in

reverse seniority order. Since there will be fewer positions established at Raceland, it is more logical to start with junior affected employees allowing the senior workers, as opposed to junior workers, to remain in Waycross and draw protective benefits. Second, since the work being transferred to Waycross would have accrued to furloughed Waycross Carmen upon the retirement, resignation or death of active Waycross employees, the furloughed Waycross Carmen should have superior rights over Raceland employees to the transferred work. However, the BRC General Chairman on the C&O takes exception to this particular proposal. Third, workers who transfer should retain dual seniority at Raceland and Waycross. If a position (other than one of temporary duration) becomes vacant at Waycross, these workers will have a one time opportunity to return to Waycross and depending on their election, they will forfeit either their Raceland or Waycross seniority. Fourth, the Organization proposes the following language for inclusion in the implementing agreement:

> "When the transfers from Waycross to Raceland take place, a like number of the C&O employees at Raceland will be provided with *New York Dock* protective conditions starting with the oldest Raceland employee that falls below the youngest employee transferring in from Waycross; i.e., if 86 Waycross carmen are dovetailed into the Raceland seniority roster, then 86 Raceland carmen–starting with the oldest Raceland carmen in seniority–who falls below the youngest carmen in seniority from Waycross will be protected by the *New York Dock* protective conditions."

The C&O General Chairman asserted that Raceland has already absorbed several consolidations involving incoming workers over the last several years. While dovetailing is the fairest method of combining seniority rosters, each added coordination has detrimentally affected the relative seniority standing of Raceland Carmen. The constant influx of more senior workers cancels the benefits

derived from the accumulation of seniority. Subsequent to the transfer of work from Waycross, it becomes more likely that some presently employed Raceland Carmen will be furloughed. Protecting Raceland workers would give them more job security and compensate them for the loss of relative seniority. If the Carriers have correctly estimated that there will be sufficient work to occupy 99 additional Carmen, it should not object to protecting an equivalent number of Raceland Carmen because presumably the latter will continue in active employment.

VI. DISCUSSION

A. Jurisdiction

1. The Notice. The threshold issue before this Committee is whether the Carriers' August 29, 1986 notice conforms to the minimum requirements of Section 4 of the New York Dock Conditions. The pertinent portion of Section 4 provides: "Such notice shall contain a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes."

The Neutral Member of this Committee commented on the purpose and meaning of the above language in another Section 4 case, as follows:

> "The purpose of the advance notice is twofold: the notice triggers the Section 4 procedures which contain tight time deadlines for obtaining an implementing agreement; and, it informs the Organization (as well as all interested employees) of the impending, authorized New York Dock transaction so that the Organization and the Carriers may bargain, in good faith, over the terms of an implementing agreement. 360 I.C.C. 71. The notice must contain a full and adequate statement of the intended transaction and include an estimate of the number of affected workers. Since the ICC, in Article 1, Section 4(a) did not enumerate the essential elements of a New York Dock

> notice (aside from the adjectives "full and adequate" and the mandatory estimate), whether a particular notice conforms to Section 4(a) must be decided on a case by case basis." *C&O/L&N v. BRS*, NYD § 4 Arb. (LaRocco, 1985).

Thus, the propriety of a Section 4 notice must be evaluated on a case by case basis taking into account the surrounding circumstances and peculiarities of each New York Dock transaction.

In this case, the notice satisfied Section 4. Since the Carriers intend to close the Waycross facility, all freight car heavy repair work will be transferred to Raceland and thus, the Carriers did not have to quantitatively or qualitatively describe the freight car repair work. Also, the Carriers, in good faith, estimated the number of employees in each class who would be involved in the force rearrangement. The notice laid the groundwork for meaningful negotiations. The Organization can hardly contend that it was ill-prepared for bargaining. The notice adequately apprised the Organization of the nature of the impending transaction because it easily ascertained that, from its perspective, the transaction would vitiate employee rights in the Orange Book and the SCL working Agreement.

2. Subject Matter Jurisdiction. In Section 1(a) of the New York Dock Conditions, the ICC broadly defines a transaction as ". . . any action taken pursuant to authorizations of this Commission on which these provisions have been imposed." 360 I.C.C. 84. The parties concur that the transfer of freight car heavy repair work from Waycross to Raceland constitutes a New York Dock transaction. It is also undisputed that the intended consolidation was not expressly and specifically presented to the Commission during administrative proceedings culminating in approval of the control application.

Where a transaction may cause the dismissal of displacement of workers, an implementing agreement:

> ". . . shall provide for the selection of forces from all employees involved on basis accepted as appropriate for application in the particular case and *any assignment of employees made necessary by the transaction* shall be made on the basis of an agreement or decision under this section 4." [Emphasis added.] 360 I.C.C. 85.

While the ICC clearly authorized the Carriers to undertake transactions, it also plainly provided for the plenary preservation of all existing collective bargaining rights, collective bargaining agreements and employee protection agreements. (See Sections 2 and 3 of the New York Dock Conditions.) When the Carriers' authorized transaction embraces components which could arguably conflict with the terms of one or more existing agreements, the issue becomes to what extent, if any, a New York Dock implementing agreement may properly preempt the existing agreements and the Railway Labor Act. The issue is an ongoing controversy in rail labor relations and is currently before the United States Supreme Court. Thus, any principles we espouse on this matter should be reevaluated based on the Supreme Court's decision in the *DRGW* case.

To resolve the issue in this case, we start by attempting to balance the competing policies of the Railway Labor Act and the ICC's New York Dock Conditions on the one side and the Interstate Commerce Act on the other side. The New York Dock Conditions were imposed on railroads for the exclusive benefit of any employee affected by a transaction. However, the Conditions were imposed as part of the ICC's overall regulatory scheme which is designed to encourage merged rail carriers to augment their ability to compete in the transportation marketplace by consolidating operations. Transactions leading to more efficient operations frequently contradict the Railway Labor Act's policy of avoiding disruptions to interstate commerce by promoting collective bargaining. Consolidations upset stable collective bargaining relationships. Thus, there is not just

tension between the Railway Labor Act and the Interstate Commerce Act but a classic clash of two important Federal statutes. Compare: *Texas and New Orleans Railroad Co. v. Brotherhood of Railroad Trainmen, supra* at 158-160, with *Brotherhood of Locomotive Engineers v. Chicago and North Western Railway Co., supra.* The conflict has been carried forward into the New York Dock Conditions.

As a quasi-judicial extension of the ICC, this Committee must strictly follow the ICC's interpretation of its own authority. In the *DRGW* case, the ICC decided that 49 U.S.C. 11341(a), the source of the exemption, granted the Commission expansive and self-executing authority to immunize an approved transaction from the Railway Labor Act and existing collective bargaining agreements to the extent the statute and terms of the agreements bar implementation of the transaction. According to the ICC, Section 11341(a) insulates a transaction from all legal obstacles preventing or impeding effectuation. Subsequent to the ICC's ruling in the *DRGW* case, arbitrators who promulgated New York Dock implementing agreements pursuant to Section 4, have universally decided that implementation of a transaction prevails over conflicting terms in existing collective bargaining agreements. *ATDA v. UP*, NYD § 4 Arb. (Fredenberger, 1984); *UTU v. MP/UP*, NYD § 4 Arb. (Ables, 1985); and *BLE v. UP/MP*, NYD § 4 Arb. (Seidenberg, 1985). In an effort to distinguish those decisions, the Organization argues herein that the ICC recently tempered its perception of the outer limits of the Section 11341(a) exemption. Pointing to a footnote at page 25 of the ICC's Brief to the Supreme Court, the Organization submits that the ICC now asserts that the exemption applies ". . . only to terms comprehended by the Commission's approval order." The Organization concludes therefore, that the exemption is inapplicable to the Waycross-Raceland coordination. We disagree. The ICC's Opening and Reply Briefs do not include any definitive language demonstrating a modification of the ICC's

broad determination that its orders supersede the Railway Labor Act. Indeed, the footnote relied on by the Organization is appended to a statement asserting that the exemption mirrors the scope of the approved transaction. Elsewhere in its briefs, the ICC reiterates that the exemption goes beyond the transactions specifically mentioned in the approval proceeding so that railroads do not have to constantly return to the ICC to receive approval for each and every change made pursuant to the ICC's original order. At page 26, the ICC emphasized that the exemption arises automatically to cover "anything authorized or required" by an approval order. The last ICC pronouncement (more recent than the footnote cited by the Organization) is found at page 11 of its Reply Brief where the ICC declared:

> "The unions are also mistaken in contending that the ICA's own labor protective provisions, 49 U.S.C. (Supp. II) 11347, prohibit the Commission from adjusting collective bargaining rights. As the Commission explained (Pet. App. 59a-60a), Section 11347 and the Commission's labor protective provisions preserve existing collective bargaining rights only to the extent that they do not conflict with implementation of an approved transaction."

Although not expressed within the control application, the Raceland coordination is an approved transaction exempt from the Railway Labor Act.

However, the exemption is only triggered when necessary. The ICC has never indicated that an approved transaction can be utilized as a pretext for extinguishing or amending existing collective bargaining agreements. To the extent that terms of collective bargaining agreements and collective bargaining rights do not thwart or substantially impede the approved transaction, those agreements and rights are preserved. Therefore, there is some harmony between Section 11341(a) of the Interstate Commerce Act and Section 6 of the Railway Labor Act. 49 U.S.C. 11341(a); 45 U.S.C. 156. If feasible, the trans-

action should reasonably accommodate existing collective bargaining agreements and collective bargainning rights.

Next, the Organization urges us to draw a delicate distinction between Section 2 and Section 3 of the New York Dock Conditions. Prior merger protection agreements might be more inviolable than existing collective bargaining agreements because the prior merger agreements, like the Orange Book, were formulated under the auspices of Section 5(2)(f) (now Section 11347) of the Interstate Commerce Act. If so, the Organization correctly argues that the ICC must expressly relieve the Carriers from Orange Book provisions when it engages in a New York Dock transaction pursuant to an approval order issued subsequent to the order approving the ACL-SAL merger. Given the mandate in Section 11347, there is some doubt that Section 11341(a) exempts New York Dock transactions from conflicting terms in prior merger protective agreements. To our knowledge, the ICC has not addressed this dilemma. In the *DRGW* case, the ICC did not patently rule that the exemption abrogates prior employee protective agreements such as the Orange Book. We cannot speculate on exactly how the ICC would handle prior merger protection agreements. However, as we discussed above, the ICC has emphasized that a transaction hurdles all legal obstacles preventing implementation. Moreover, most rights and benefits preserved to employees under Section 3 of the New York Dock Conditions will be safeguarded through prudent applications of the reasonable accommodation standard.

Therefore, this Committee has jurisdiction to formulate an implementing agreement governing the transfer of work and employees from Waycross to Raceland.

B. The Contents of an Implementing Agreement

1. **The Orange Book.** Section 2(b) of the Orange Book provides that a covered employee will not be deprived of employment or placed in a worse position with regard

to his working conditions at any time during such employment with the SCL. In exchange for lifetime protection, the Carriers acquired the right to transfer work and workers throughout the merged (SAL-ACL) system. See Orange Book Section 3(a). To that end, Section 3(a) calls for the execution of mandatory implementing agreements. Without such a clause, the point seniority terms of the working agreement would have restricted the Carriers from moving employees. Since it was necessary for the SCL to obtain a provision allowing it to transfer Orange Book protected employees throughout the merged system, it logically follows that a similar term is essential to permit the Carriers to transfer Orange Book covered workers beyond the SCL property. Instead, the Carriers desire to translate a limited, affirmative right into the unfettered discretion to transfer Orange Book workers throughout any enlarged rail system. An affirmative right carries an inherent implication that the right is restricted to the express terms conferring the affirmative right. The affirmative right is capped. Under the Carriers' interpretation, the Section 3(a) language would be unnecessary since they ostensibly have the right to transfer Orange Book employees throughout the SCL, L&N, B&O and the C&O. The parties do not enter into solemnly negotiated agreements only to have the terms of their agreements rendered meaningless or superfluous. The ACL and SAL could have foreseen that they might later become the part of an even larger rail enterprise. Thus, drafters of the Orange Brook could have easily written terms providing for unrestricted transfers across any enlarged rail system.

Our decision that the Carriers may not transfer Orange Book protected employees beyond the former SCL property is premised on the clear and express language of Section 3(a). While a past practice may not vary or alter the clear and unambiguous Orange Book language, the Carriers' reference to prior implementing agreements was insufficient to raise a consistent and genuine past prac-

tice even if Section 3(a) was susceptible to differing interpretations. The prior implementing agreements involved a modicum of Orange Book covered workers and under some of the agreements, the Orange Book employees could receive separation pay, an option they probably chose. The December 30, 1980 implementing agreement resulted in the transfer of Orange Book covered employees form the SCL to the C&O but only within the same city. In any event, the Organization voluntarily entered into the implementing agreement. Although other labor organizations have signed implementing agreements with the Carriers governing this transaction, at most there was only one Orange Book employee involved. Thus, these implementing agreements provide us with little guidance in interpreting the Orange Book.

Even though Orange Book Section 3(a) provides that the work of Orange Book protected employees may be transferred throughout the SCL property (but no further), the provision must be subordinated to the Carriers' right to engage in the authorized New York Dock transaction. Otherwise, the Carriers would be effectively thwarted from transferring all the Waycross freight car heavy repair work to Raceland. Unlike the work, the Orange Book limitation on transferring covered employees throughout the SCL system can be reasonably accommodated with the transaction. Permitting Orange Book covered workers to be transferred only throughout the SCL (absent a voluntary agreement with the Organization) will only slightly impair the transaction while preserving the essence of the Orange Book pursuant to Section 3 of the New York Dock Conditions. Even under the Carriers' proposed implementing agreement, some of the Orange Book employees would have exercised their seniority to remaining positions at Waycross in lieu of transferring to Raceland. In summary, this Committee emphasizes that whether or not Section 3(a) can be reasonably accommodated with a New York Dock transaction must be analyzed on a case by case basis.

Enforcing the limit on transferring Orange Book protected employees might, under different facts, operate to completely bar the transaction. Then, the ICC's authorized transaction would be paramount to Orange Book Section 3(a). In this case, the Carriers may not compel Orange Book protected workers to accept Raceland positions.

This Committee realizes that its decision will create an anomaly. The more senior Orange Book workers will be able to obtain other positions at Waycross. The junior Orange Book protected workers, who will presumably decline Raceland positions will collect Orange Book benefits. However, the Carriers have other alternatives under the Orange Book.

Despite the terminology in Orange Book Section 3(a), the New York Dock implementing agreement covering this transaction shall provide, without restriction, for the transfer of all freight car heavy repair work from Waycross to Raceland. As soon as the Carriers commence the transaction, Orange Book protected employees who are affected by the transaction must elect either New York Dock benefits or Orange Book protection. *BRAC v. SSR*, NYD § 4 Arb. (Zumas, 1983).

2. **Other Issues.** For the reasons discussed earlier in our opinion, the work and employees transferred from Waycross shall be placed under the C&O schedule Agreement. Maintaining the work or employees under the SCL working agreement would for all practical purposes, block the transaction. A reasonable accommodation is impossible since the terms of the working agreement conflict with the implementation of the transaction.

Regardless of whether Raceland or Waycross has the more comfortable climate, the Carriers would be barred from effectuating any New York Dock transaction if workers could decline a transfer merely by asserting that the weather at their current point was more amenable than the meteorological conditions at the coordinated location.

Most importantly, the Organization is unable to cite any term in any existing agreement vesting Carmen with the right to perform work in a particular climate.

Most of the Organization's other proposals concern the inclusion of benefits more generous than the minimum level of benefits prescribed by the New York Dock Conditions. When fashioning an implementing agreement, a Section 4 arbitrator must adhere to the New York Dock Conditions. *BRC v. C&O/SSR (L&N)*, NYD § 4 Arb. (Marx, 1984). The parties are, of course, free to incorporate benefits above and beyond those in the New York Dock Conditions. In addition, the Carriers cannot be bound to their earlier offers containing benefits greater than those in the New York Dock Conditions. No party would offer a compromise if the party could later be held to the offer. Conditioning an agreement on acceptance of a package deal is a common tactic in labor negotiations. Thus, the Carriers could properly withdraw their October 10, 1986 proposed implementing agreement without prejudice to their position before this Committee.

The BRC's General Chairman on the C&O petitions us to automatically certify (for New York Dock protection) an equivalent number of junior Raceland Carmen corresponding to the number of workers transferring into Raceland. Section 1 of the Carriers' proposal provides blanket New York Dock coverage for all workers (at any location) who are affected by the instant transaction. The Carriers' proposal is simple and straightforward. In the control case, the ICC rejected labor's position that any adverse employment effect should be conclusively presumed to be merge related. 363 I.C.C. 521, 589. Whether any Raceland worker is affected by this transaction and eligible for New York Dock protection must be referred to a Section 11 arbitration committee. Waycross employees moving to Raceland shall be dovetailed into the appropriate roster under the C&O Agreement.

Section 4 of the New York Dock Conditions charges us with selecting forces on a basis appropriate for this transaction. The BRC proposes that Waycross Carmen, who transfer to Raceland, retain their Waycross seniority and have a one time right of first refusal to a permanent Waycross vacancy. The New York Dock Conditions contemplate an orderly and final adjustment of forces during implementation of the transaction. Maintenance of dual seniority defeats that objective. Finally, the parties should incorporate the Carriers' proposed preference tires for filling Raceland positions. [See Section 3(f) of the Carriers' October 15, 1986 proposal.]

Due to our finding that, under the unique facts of this case, the New York Dock Conditions prevent the Carrier from transferring Orange Book protected workers to Raceland, the Carrier must be given an opportunity to reevaluate the number of positions to be either abolished at Waycross or established at Raceland. If the Carrier adjusts the number of positions at either point, the amendment should be incorporated into the implementing agreement.

In summary, this Committee adopts the Carriers' proposed implementing agreement dated October 15, 1986 with the modifications specified in our Opinion. The parties agree that the effective date of this Award shall be March 23, 1987.

AWARD AND ORDER

This Committee renders the following Award and Order:

1. The Committee has jurisdiction over the subject matter of this dispute;

2. The parties shall adopt the Carriers' October 15, 1986 proposal as the Implementing Agreement governing the Waycross-Raceland Coordination with the following modifications:

   a. Adopt any adjustment in the number of positions to be either abolished at Waycross or established at Raceland; and,

   b. Adopt a provision relating to Orange Book protected workers which is consistent with this Opinion;

3. The Answer to the Organization's Issue No. 1 is "Yes";

4. The Answer to the Organization's Issue No. 2 is "No";

5. The Answer to the Organization's Issue No. 3 is "Yes";

6. The Answer to the Organization's Issue No. 4 is specified in (2) above;

7. The Answer to the Question at Issue presented by the BRC General Chairman on the C&O is "No."

Dated: March 23, 1987

/s/ R.P. WOJTOWICZ, Dissenting
R.P. Wojtowicz
Employees' Member

/s/ J.T. WILLIAMS.
Concurring in Part
And Dissenting in Part
J.T. Williams
Carriers' Member

/s/ JOHN B. LAROCCO
John B. LaRocco
Neutral Member

CARRIERS MEMBER'S CONCURRENCE AND DISSENT TO AWARD DATED MARCH 23, 1987, PURSUANT TO ARTICLE I, SECTION 4 OF THE NEW YORK DOCK CONDITIONS AND SECTION 4 OF THE NOVEMBER 3, 1966 MERGER PROTECTIVE AGREEMENT

I concur with the Committee's Award and Order in paragraphs 1, 2, 2(a), 3, 5, 7, and that portion of paragraph 6 that incorporates paragraphs 2 and 2(a). I dissent from the Committee's Award and Order in paragraphs 2(b), 4, and that portion of paragraph 6 that incorporates paragraph 2(b), for the reasons set forth below.

I. The Committee's Interpretation of the Orange Book Is Completely Without Foundation in the Arbitral Record or the Agreement and Exceeds Its Jurisdiction.

The Orange Book Agreement is a merger protective agreement entered into by Seaboard Air Line Railroad Company and Atlantic Coast Line Railroad Company on November 3, 1966, in connection with the ICC-autorized merger which created the Seaboard Coast Line Railroad Company (SCL).* Pursuant to Section 4 of the Orange Book, this Committee was constituted in part to determine whether the Orange Book prohibited transfer of Orange Book-protected employees from a freight car heavy repair facility at Waycross, Georgia, formerly an SCL location, to Raceland, Kentucky, on The Chesapeake and Ohio Railway Company (C&O). The conclusion of this Committee that the Orange Book prohibits transfer of protected employees and their work off the SCL property is completely without foundation in the arbitral record or the Orange Book itself and exceeds the Committee's jurisdiction. There is absolutely no language in the Orange Book

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* As a result of subsequent mergers and name changes, CSX Transportation, Inc., is the current successor of SCL.

that supports such a conclusion and the action of the Committee is tantamount ot ignoring its express provisions and to rewriting the Agreement.

The Committee places total reliance for its conclusion on section 3(a) of the Agreement, which provides, in relevant part:

> (a) In consideration of the foregoing employee benefits the Merged Company shall, subject to compliance with the provisions of Appendix F attached hereto, be entitled to transfer the work of the employees protected hereunder throughout the merged or consolidated system and the labor organizations will, subject to provisions contained in the Memorandum of Understanding attached hereto as Appendix G, enter into implementing agreements providing for the transfer and use of employees and allocation or rearrangement of forces made necessary by changes for which protection is herein provided and the employees, their organizations and the Carriers will cooperate to that end.

This language does not even purport to prohibit the transfer of work and protected employees off the former SCL system. The Committee's assertion that section 3(a) clearly and unambiguously prohibits such transfers is completely outside any reasonable reading of that section. Indeed, clear and unambiguous language to that effect could have easily been written, had such a limitation been intended, i.e.: " The Merged Company is prohibited from transferring work and protected employees off the property of the Merged Company as it exists on the date of merger." The Orange Book contains nothing even remotely resembling such language.

Section 3(a) quite simply authorized the SCL to transfer work and employees throughout its merged or consolidated system as it then existed as a result of the authouized SAL-ACL merger. The Orange Book does not include a prohibition on transfers off the SCL property. If any such

prohibitions exist, they must be found in the applicable working agreement, not in the Orange Book. Indeed, the Committee acknowledges at p. 35 of the Award that the source of any such restriction is the "point seniority terms of the working agreement." Thus, the affirmative transfer rights provided by the Orange Book overrode the working agreement by permitting transfers throughout the merged system.

Orange Book protected employees were not intended to have greater protections against transfers than non-protected employees; indeed, one purpose of the Orange Book was to eliminate any restriction against transfers in exchange for the protective benefits granted in that agreement.

The Committee is totally in error when it states at page 35 of the Opinion that the Carriers are attempting "to translate a limited, affirmative right [to transfer Orange Book employees throughout the SCL] into an unfettered discretion to transfer Orange Book workers throughout any enlarged rail system." The Carriers never urged that the Orange Book was the source of its right to transfer Orange Book employees from Waycross to Raceland. The Carriers never served a notice under the Orange Book to accomplish the transfer to Raceland. The source of the Carriers' right in this transaction is the ICC authorization and the *New York Dock* Conditions. The Carriers served a *New York Dock* notice under the ICC's *CSX-Control* authorization to accomplish not only the transfer of *work*, but equally as important, the transfer of Orange Book *employees* to Raceland. Where the carrier obtains the authorization to transfer its employees off former SCL property from an independent source, such as the instant ICC order and the accompanying *New York Dock* conditions, nothing in the Orange Book prohibits the exercise of that authority with respect to Orange Book-protected employees.

Contrary to the Committee's understanding, the Carriers never stated that Section 3(a) of the Orange Book provided the affirmative right to transfer employees to Raceland. The Carriers correctly asserted that Section 3(a) *did not prohibit* transfers off the SCL. It neither authorized nor prohibited such transfers because the Orange Book looked only to the SCL merger. Absent any such prohibition, the Committee exceeded its authority by fashioning one out of whole cloth.

Furthermore, the Committee's discussion of the Orange Book in Section B.1. completely ignores Section 2(e) of the Orange Book, which expressly provides that Orange Book protection may be terminated in case of an employee's "failure to obtain a position available to him in the exercise of his seniority rights in accordance with existing rules or agreements." This language is *not* limited to exercise of seniority rights on the SCL property. Rather, it requires the exercise of any seniority rights an Orange Book employee may have or may acquire under existing agreements at any point in time. Section 2(e) is full applicable to situations such as the present one where by virtue of an ICC-authorized *New York Dock* transaction, an Orange Book employee acquires seniority rights to a position available to him off the SCL property. In this case the Carriers, transaction results in Orange Book employees acquiring seniority rights to Raceland positions. The Committee's conclusion that an Orange Book employee can reject a position to which he has seniority rights and retain his Orange Book protection is flatly contrary to the express mandate of section 2(e) of the Orange Book. The Committee's Award effectively writes section 2(e) out of the Agreement.

The Committee's interpretation of the Orange Book is also contrary to all of the evidence submitted at the hearing. The Carmen submitted *absolutely no evidence* to support their claimed interpretation of the Orange Book.

Carriers, by contrast, submitted numerous implementing agreements with various crafts, including the Carmen, that explicitly provided that an Orange Book employee who declines a job off former SCL property *forfeits his Orange Book protection.* An Orange Book employee's only alternative to making a required relocation is to elect to resign in exchange for a lump sum separation allowance pursuant to Appendix G of the Orange Book.

These prior implementing agreements stand as unrefuted evidence of the parties' interpretation of the Orange Book. The first such agreement was entered into in 1967 and the Carmen were a party to it; more recently, such agreements were entered into less than two months prior to this arbitration hearing. The 1967 agreement is particularly compelling since it was entered into within one year of the Orange Book itself. These agreements establish that the parties have in fact applied the Orange Book precisely in accordance with the Carriers' position in this case: if an implementing agreement makes a position off the former SCL available to an Orange Book employee and that employee cannot otherwise hold an SCL position, the employee cannot decline the available position and retain his Orange Book protection.

The arbitral record contains no contrary evidence -- the Carmen could produce no implementing agreements which provided that Orange Book employees could decline positions off former SCL property and retain their Orange Book protection; nor could they cite even one instance where the Carriers attempted to transfer Orange Book employees off the SCL but were unable to do so because of any language in the Orange Book. Furthermore, the Carriers produced actual instances of approximately eighty Orange Book protected employees who were transferred off SCL property. The Carmen could not produce even one instance where an Orange Book-protected employee refused to transfer off former SCL property and retained

his protection. The implementing agreements unequivocally support Carriers' position that the Orange Book does not prohibit transfers off SCL property.

Carriers exhibited as part of their evidence in this case a prior New York Dock Section 4 arbitration award on this property in which the Neutral Member of this Committee (LaRocco) held:

> "Article I, Section 4 provides for the selection of forces which is most appropriate in each case. *The most reliable evidence for determining the appropriate method of allocating forces in this case is to look at how the parties resolved a similar issue in the past.*" (emphasis added)

In the case at hand, the Carriers submitted in evidence a dozen implementing agreements with the Carmen and other unions party to the Orange Book, all of which contemplated the transfer of Orange Book employees off the SCL to other railroads. Despite "looking" at these instances of how the parties interpreted the Orange Book in the past, this same Neutral Member (LaRocco) unaccountably chose to discount the implementing agreements as providing "us with little guidance in interpreting the Orange Book." Opinion at p. 36.

Of the dozen implementing agreements submitted in evidence by the Carriers, the Committee chose to discuss one – a 1980 agreement – which it noted involved transfers within the same city, but for reasons unexplained, ignored the several other agreements involving transfers between different cities. Although the Carriers' evidence clearly showed the actual names of more than eighty Orange Book employees who did transfer off the SCL to other railroads, the Committee described that number as a "modicum" and speculated without foundation that the Orange Book employees "probably" opted for a separation allowance in lieu of transferring. The Committee ignored the fact that separation allowances would have been available in the present transaction to those Orange

Book employees who prefer that option to transferring to Raceland.

The Committee at page 36 lays the erroneous foundation that the language of Section 3(a) is "clear and express" in prohibiting transfers of Orange Book employees off the SCL in order to discount the compelling evidence of past practice presented by the Carriers and to divert attention from the glaring lack of evidence presented by the Carmen. The Committee then characterizes the Carriers' evidence as "insufficient to raise a consistent and genuine past practice." An unbiased review of the record reveals a dozen implementing agreements which contemplated transfers of Orange Book employees off the SCL. The Carmen produced no implementing agreements at all. Thus, 100% of the evidence demonstrated a consistent and genuine past practice of twenty years' duration supporting the Carriers' position. There is absolutely no support in any of the agreements for existence of an Orange Book prohibition against transfers off SCL property.

The Committee also implicitly suggests that the organizations may have voluntarily waived Orange Book rights of their members. This suggestion is ludicrous. There is only one explanation why time after time over a twenty year period organizations acknowledged that Orange Book employees must accept positions off SCL property: they had no choice, because the Orange Book itself did not protect the employees against the required transfers.

The foregoing agreements and evidence flatly controvert the Committee's conclusion that an Orange Book employee may refuse to transfer off SCL property and still retain his Orange Book protection. They compel the finding that an Orange Book employee has no such right.

Finally, Carriers submitted an affidavit from C. E. Mervine, the retired Senior Vice President - Labor Relations who participated in the Orange Book negotiations, which was in complete harmony with the history of the

parties' actions as evidenced by the implementing agreements. For example, the affidavit states:

> 10. . . . I have particularly noted Mr. McAlpine's claims that the Orange Book insulates an employee protected under its terms from being required to transfer to locations other than those on the former Seaboard Coast Line property. Mr. McAlpine is in error, because from my knowledge of the Orange Book and its terms, and being very familiar with its intent, I can state that it grants no such right to employees protected thereunder; nor did the parties signatory to the Orange Book ever intend or contemplate that Orange Book protected employees would ever have or secure such rights.

The Carmen produced no contrary evidence from any union negotiators. The Committee simply ignored the affidavit, which makes clear that the Orange Book does not permit protected employees to refuse transfers off former SCL property and retain protection.

The Committee, acting in its capacity under Section 4 of the Orange Book Agreement, has exceeded its jurisdiction by reaching an interpretation of the Orange Book that disregards the express language of that Agreement as well as the unrebutted evidence in the record. The interpretation is wholly baseless and fails to draw its essence from the Orange Book or the record before the Committee; accordingly, I dissent.

II. The Committee Errs in Refusing to Supersede its Perceived Limitation on the Transfer of Orange Book-Protected Employees.

Separate from and independent of its erroneous conclusion discussed above, the Committee errs in refusing to carry out its obligation under the Interstate Commerce Act and Article I, Section 4 of the *New York Dock* Conditions to supersede those provisions of the Orange Book that the Committee finds limit Carriers' authority to

transfer Orange Book-protected employees from Waycross to Raceland.

In refusing to supersede this perceived contractual limitation, the Committee has erroneously applied the very I.C.C. decisions that it recognizes establish the proper standard under the Interstate Commerce Act and that it purports to follow. Those decisions establish that contractual and other legal limitations that "conflict with" a carrier's proposed implementation of an I.C.C.-approved "transaction" are, as a matter of law, superseded as a result of section 11341 (a) of the Interstate Commerce Act. Because a limitation on the transfer of Orange Book-protected employees clearly "conflicts with" the authorized transaction, as the Committee recognizes in its Opinion, the Committee should have approved the Carriers' proposed implementing agreement that would have required such employees to follow their available work from Waycross to Raceland.

At page 33 of its Opinion, the Committee correctly concludes that "the Raceland coordination is an approved transaction." Indeed, as the Committee accurately observed, the Carmen acknowledged the the "transfer of freight car heavy repair work from Waycross to Raceland constitutes a New York Dock transaction." Opinion at 29-30. Thus, the proposed transfer of work is an "action taken pursuant to authorizations of [the Interstate Commerce] Commission" in *CSX-Control. New York Dock* Conditions, Article I, Section 1 (a).

The Committee also correctly recognizes at page 33 of its Opinion that, as an I.C.C.-approved transaction, the proposed transfer is "exempt from the Railway Labor Act" as a result of the provisions of section 11341 (a) of the I.C.A., which provides in relevant part that:

> "A carrier ... participating in that approved or exempted transaction is exempt from the anti-trust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction ...."

Moreover, the Committee properly recognizes that, under Article I, Section 4 of the *New York Dock* Conditions, it serves as "a quasi-judicial extension of the ICC" and, as such, "must strictly follow the ICC's interpretation of its own authority." Opinion at 31. The Committee acknowledges that the I.C.C.'s definitive interpretation of its authority under the Interstate Commerce Act is contained in its *D.R.G.W.* decision.

The standard articulated by the I.C.C. in its *D.R.G.W.* decision is a clear one and is quoted by the Committee in its Opinion:

> "To the extent that existing working conditions and collective bargaining agreements *conflict with* a transaction which we have approved, those conditions and agreements must give way to the implementation of the transaction." *D.R.G.W.*, slip op. at 6 (emphasis added); Opinion at 17.

As the I.C.C. explained in its Supreme Court reply brief in *B.L.E.* v. *I.C.C.*:

> "Section 11347 and the Commission's labor protective provisions preserve existing collective bargaining rights only to the extent that they do not *conflict with* implementation of an approved transaction." Opinion at 33 (emphasis added).

Thus, the I.C.C. has definitively interpreted the I.C.A. and its own labor protective conditions as protecting existing collective bargaining agreements and existing working conditions only insofar as such agreements and conditions do not *conflict with* a carrier's proposed implementation of an I.C.C.-approved action such as the Waycross-Raceland consolidation. In the event of *any* such conflict, section 11341 (a) of the I.C.A. comes into play, and the conflicting limitation, regardless of its source, is superseded as a matter of law.

Notwithstanding its express recognition that it must "strictly follow" the I.C.C.'s interpretation and its quotation of the "conflict with" standard articulated by the Commission, the Committee errs at page 33 of its Opinion when

it creates the following additional condition for the supersession of the terms of existing collective bargaining agreements that conflict with the proposed implementation of a carrier action that has I.C.C. approval:

> "To the extent that terms of collective bargaining agreements and collective bargaining rights do not *thwart or substantially impede* the approved transaction, those agreements and rights are preserved. (Emphasis added.)

The Committee adopts this additional condition based on its erroneous determination that an "accommodation" is required between a proposed transaction and existing collective bargaining agreements and collective bargaining rights. Opinion at 33.

The Committee's stringent "thwart or substantially impede" condition is directly contrary to the "conflict with" standard articulated by the I.C.C. in *D.R.G.W.* Moreover, the Committee's conclusion that the I.C.C. has empowered it to engage in some sort of standardless balancing of the Carriers' right to implement the proposed transaction with the Carmen's asserted collective bargaining rights in order to achieve a "reasonable accommodation" is flatly inconsistent with the Commission's *D.R.G.W.* decision and its subsequent decision in *Maine Central.** The Committee's position improperly delegates unto itself the power to rewrite the transaction and make the business decision as to how the transaction should be structured.

In both *D.R.G.W.* and *Maine Central* the unions argued that existing collective bargaining agreements and working conditions could not be superseded because of the provisions in the Commission's labor protective conditions, such as those found in Article I, Sections 2 and 3 of the *New York Dock* Conditions, that preserve such agreements

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* *Maine Central R.R. Co., Georgia Pacific Corp., Canadian Pacific Ltd. and Springfield Terminal Ry Co. – Exemption from 49 U.S.C. 11342 and 11343*, Finance Docket No. 30532 (1985).

and working conditions. The Commission flatly rejected this contention:

> "The labor conditions imposed under section 11347 preserve conditions and agreements *in the context of* the authorized transaction." *D.R.G.W.*, slip op. at 6 (emphasis added).*

In rejecting labor's argument, the Commission did not provide that any sort of "reasonable accommodation" of the proposed transaction with such agreements was appropriate or permissible. Nor did the Commission state that only those collective bargaining agreements that would go so far as to "thwart or substantially impede" the approved carrier action are superseded. Indeed, the Commission directed that,

> "To the extent that existing working conditions and collective bargaining agreements *conflict with* a transaction which we have approved, those conditions and agreements *must give way* to the implementation of the transaction." *D.R.G.W.*, slip op. at 6 (emphasis added).

Thus, the Commission has authoritatively interpreted I.C.A. Section 11341(a) and its own labor protection conditions as requiring the supersession of any terms of existing collective bargaining agreements that *conflict with* a proposed carrier implementation of an approved transaction. The carrier need not show that the proposed implementa-

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* The Commission rejected a similar argument in *Maine Central*:

> "For the same reason we reject the argument that the provision of our conditions requiring that working conditions not be changed except pursuant to renegotiated collective bargaining agreements reinvigorates the RLA and causes its provisons to supersede the mechanism for resolving disputes associated with negotiating implementing agreements contained in the labor protective conditions we impose on approved transactions. *Maine Central*, slip op. at 7n. 11.

tion would be impossible or even extremely difficult absent freedom from contractual limitations. Such limitations "must give way," in the words of the I.C.C. in *D.R.G.W.*, whenever they "conflict with" the implementation of an approved transaction.

Had the Commission simply applied the "conflict with" standard as articulated by the I.C.C. in *D.R.G.W.*, it is apparent that it would have approved the Carrier's proposed implementing agreement and would have provided for the transfer of Orange Book-protected employees. The limitation on such a transfer that the Committee erroneously found in the Orange Book "conflicted with" Carriers' proposed implementation of the I.C.C.-approved transaction, since the transaction clearly included the transfer of Orange Book employees from Waycross to Raceland. The Orange Book prohibition that would restrict the Carriers from being able to transfer Orange Book employees with their work to Raceland clearly conflicts with the approved transaction.

The impact of the Committee's error in interpreting its own authority is severe. Carriers proposed to establish 86 carmen positions at Raceland. Of the 86 Waycross carmen who should be required to follow their work to Raceland, 57 have Orange Book protection. Under the Committee's award, these 57 Waycross employees can refuse to accept positions at Raceland, and continue to receive full pay despite the authorized transfer of their heavy repair work to Raceland. The Committee is in error when it claims at p. 37 of its Opinion that some of those employees could exercise seniority to remaining positions at Waycross. After the transfer of the work, there will be no existing positions at Waycross to which these 57 carmen can exercise seniority. The annual cost of carrying these 57 Orange Book employees on the payroll is *well in excess of $2 million.* In cavalier fashion, the Committee finds at page 37 that this burden "will only slightly impair the transaction." In fact, the Committee's conclusion presents a severe

conflict with implementation of the proposed coordination of repair work at Raceland.

As explained above, leaving in place the perceived limitation on the transfer of Orange Book employees will impose enormous costs on the Carriers that will substantially diminish, if not wholly consume, the economies and operating efficiencies associated with the proposed shop consolidation. Under any definition, such a limitation will "substantially impede" the authorized transaction, and cannot represent a "reasonable accommodation" of the transaction and the perceived Orange Book restriction. Thus, even if the additional condition applied by the Committee – that only those contractual limitations that would "thwart or substantially impede" an approved carrier action must "give way" – is a correct interpretation of the Interstate Commerce Act and the *New York Dock* Conditions, the Committee erred in its application of that additional condition in this case.

This nation's transportation policy has for decades been to foster and encourage the consolidation of rail carriers so as to obtain economies and efficiencies in furtherance of the public interest. Congress, through the Interstate Commerce Act, and the ICC have declared that legal and contractual impediments that conflict with the implementation of such consolidations must give way. The Committee's failure to follow the "conflict with" standard of the ICC and its refusal to supersede the perceived Orange Book limitation are flatly inconsistent with the underlying purpose of the Interstate Commerce Act and the ICC's consolidation approval in *CSX-Control*.

Accordingly, I dissent from paragraphs 2(b), 4, and that portion of paragraph 6 that incorporates paragraph 2(b) of the Committee's Award and Order.

/s/ J. T. WILLIAMS
J. T. WILLIAMS
Carriers' Member

DISSENT OF EMPLOYEES' MEMBER

I dissent from the award and each material finding and conclusion contained in the Majority Opinion except that which affords the employees their Orange Book protection, however, I dissent from the Majority Opinion's reservations regarding even that protection.

The opinion and award in this case commit three egregious errors, all of which were called to the Neutral Member's attention and all of which were distainfully rejected or ignored.

With this decision we have almost reached the nadir in the application of what may now be ludicrously referred to as "employee protective" conditions. The Commission at one time agreed with the Congress and the courts that it could not inject itself into the area of labor relations except to the extent Congress permitted it to do so in protecting the monetary and contractual rights of employees affected by "actions taken pursuant to authorizations of the Commission." The Commission emphasized the protections it had designed as being "imposed upon railroads" for the "protection of employees".

The Commission, in the opinion of this Member, has irresponsibly strayed from the path it formerly travelled with regard to labor relations. However, no Commission ruling has gone so far to destroy the Railway Labor Act and collective bargaining agreement rights of employees as has the Neutral and Carriers' Members of this Committee in their decision in this case.

In every case in which the Commission has *held* it can supersede Railway Labor Act and collective bargaining agreement rights of employees by virtue of the existence of Section 11341(a) of the Interstate Commerce Act, 49 U.S.C. §11341(a), it has done so based upon a claim that the specific carrier "action " had been presented to and 'approved" by the Commission in its approval of the financial transaction presented to it, e.g., a crew assignment provision in an ICC-approved trackage rights agreement.

The carrier "action" proposed here was never presented to or considered by the Commission. The Commission did not "approve" it. The only provisions in the Commission's orders affecting this case are contained in Sections 2 and 3 of the *New York Dock* conditions prohibiting interference with employee Railway Labor Act and collective bargaining agreement rights which sections the Majority Opinion herein considers ineffective.

The most basic and material error contained in the opinion, an error rendering invalid the entire proceeding, is factual and cannot be disputed. Section 4 of *New York Dock* requires a carrier to provide the representatives of their employees "a full and adequate statement of the changes to be effected." It cannot be reasonably disputed that the carriers' notice in this case did not satisfy that requirement. The BRC, as the employees' representative, had "heard" that some work in the Waycross shop was to be transferred to "some point" other than Raceland and sought to find out from the carrier the amount and identity of the work to be moved to Raceland but were rebuffed. [BRC-Div. of BRAC Submission, p. 20]

Following the hearing in the instant case, an injunction proceeding was brought in the U.S. District Court and during the course of a hearing before that Court it developed that the hopper car work which had been performed at Waycross for many years and constituted fully 50% of the "freight car heavy repair work" at Waycross was being transferred to Tampa. In a letter addressed to William G. Mahoney, Attorney for BRC Division of BRAC, and James D. Tomola, Attorney for CSX, the Neutral and Carriers' Members rejected BRC's request for the reopening of this proceeding in order to receive the new evidence developed before the federal court on the ground that "the work is a special covered hopper car program" (apparently the Carriers' Member so informed the Neutral Member after the hearing and the Neutral Member took him at his word) and because "the organization was aware before the arbitration hearing that this work was being transferred to

Tampa", referring to page 20 of BRC's Submission. But the statement on page 20 merely emphasizes the inadequacy of the carriers' notice. Certainly, there is no indication on that, or any other page of its Submission that BRC knew before the arbitration hearing that 50% of the freight car heavy repair work was being transferred to Tampa. (A copy of the letter rejecting the BRC's Motion to Reopen and a copy of the page 20 relied upon by the Neutral and Carriers' Members is appended to this dissent.)

The Notice of August 29, 1986 was inadequate and misleading, because it clearly indicated and led the BRC *and the Neutral* to believe that *all* freight car heavy repair work was being transferred from Waycross to Raceland at a time when fully one-half of it was being transferred to Tampa. Indeed, as noted below, the Majority Opinion relies heavily on this factual error. Therefore, the entire proceeding should have been ruled invalid, or at the very least, the proceeding should have been reopened to permit the issue of the Tampa work to have been fully developed. If that opportunity had been afforded BRC, it could have been demonstrated that the "work [was not] a special covered hopper car program" as found by the Neutral and the Carriers' Members in the letter of March 20, 1987, appended hereto, and that the work comprised at least 50% of the freight car heavy repair work being transferred.

The Majority Opinion confirms that it is based upon a substantial and substantive factual error, viz, that *all* freight car heavy repair work was being transferred to Raceland. At page 29, the Neutral and Carriers' Members find that the notice satisfied Section 4 and because "*all* freight car heavy repair work will be transferred to Raceland and thus, the Carriers did not have to quantitatively or qualitatively describe the freight car repair work" in their Section 4 notice. Of course, one-half of the freight car repair work was being transferred to Tampa rendering the foregoing factual finding clearly in error.

At page 34 of the Majority Opinion, it is found that the arbitration committee "has jurisdiction to formulate an implementing agreement governing the transfer of work and employees from Waycross to Raceland." No mention is made of the fact that one-half of that work has now been transferred to Tampa.

At page 37, in determining that it has the right to supersede the Railway Labor Act and collective bargaining agreement rights of the employees, the Majority of the Committee finds: "Otherwise the Carriers would be effectively thwarted from transferring *all* the Waycross freight car heavy repair work to Raceland." And, again at page 38, the Neutral and Carriers' Members of the Committee determined that the agreement they shall write and impose upon the employees "shall provide, without restriction, for the transfer of *all* freight car heavy repair work from Waycross to Raceland."

The repeated findings of fact that "all freight car heavy repair work" was going to be transferred from Waycross to Raceland is simply erroneous. The statement on page 20 of the Submission, appended hereto, as well as the notice and the findings of fact on "all " work dramatize the inadequacy of the notice and the basic unfairness demonstrated by the Neutral and Carriers' Members in this case in refusing to reopen this proceeding to review the facts which contradict the findings and by the Neutral Member's acceptance of an unsubstantiated statement that the "work is a special covered hopper car repair program."

The Majority of the Committee conclude at page 31 that "transactions leading to more efficient operations frequently contradict the Railway Labor Act's policy of avoiding disruptions to interstate commerce by promoting collective bargaining." The decision then goes on to conclude that the two Acts are not to be accommodated to each other but that in every case where some efficiency is employed by a carrier following a control or merger approval by the ICC, and whether or not it was brought to the attention

of the ICC and whether or not the Interstate Commerce Act gave the ICC independent authority to approve it, the Railway Labor Act must give way to the railroad's desires.

The Interstate Commerce Act, of course, does *not* empower the ICC to approve or disapprove yard or shop consolidations. When operational changes, such as yard or shop consolidations, not under ICC jurisdiction, are presented to the ICC during the course of a merger or control proceeding, the ICC looks at them only insofar as they might render the transaction before it consistent or inconsistent with the public interest. The ICC has no independent statutory jurisdiction over such activity. The carriers do not require ICC authority prior to the consolidation of yards or shops whether such consolidations are intra- or inter-carrier. (Obviously, inter-carrier consolidations of shops would make little economic or operational sense unless the carriers involved were already under common control.)

If the ICC did not review a particular consolidation during a control or merger proceeding prior to approving the merger or control, it cannot thereafter approve or disapprove it under the Interstate Commerce Act. The carrier could not "constantly return to the ICC to receive approval" for each and every change made pursuant to the ICC's original order about which the Majority lavishes such concern at pages 32-33 of its opinion, simply because the I.C.C. does not have the statutory authority to approve such consolidations.

If the Interstate Commerce Act contains no ICC authority to approve a shop consolidation such as that described in the notice issued in this proceeding, then that Act cannot possibly be in conflict with the provisions of the Railway Labor Act much less prevail over the Railway Labor Act in an area which the Interstate Commerce Act does not even attempt to regulate.

The Majority Opinion is clear in its conclusion that all collective bargaining agreements, even pre-existing

employee protection agreements executed in earlier merger cases with the same carriers, are eliminated by the "ICC authorized transaction" if they "operate to completely bar the transaction". (Majority Opinion, page 37.)

The opinion, however, uses such vague, general and undefined terms as to render extinct the Railway Labor Act rights of employees in all cases.

At page 33, for example, the ICC is quoted as stating that the Section 11341(a) "exemption arises automatically to cover 'anything authorized or required' by the order. " The conclusion is then reached that "the Raceland coordination is an approved transaction exempt from the Railway Labor Act." Aside from the fact that the ICC has no statutory authority to approve the "Raceland coordination" after it has approved a transaction of which the coordination may be a result, the Majority Opinion concludes [page 33] that §11341(a) "is only triggered when necessary." The implication here, therefore, is clear that the "Raceland coordination" is "necessary" because the "Raceland coordination" is repeatedly referred to as an "approved" or "authorized transaction" [see pp. 33, 37].

The "Raceland coordination" was not approved during the course of the control case before the Commission because it was never presented to the ICC. The ICC could not now approve the "Raceland coordination" because it is not given jurisdiction over shop consolidations by the Interstate Commerce Act. Therefore, the implication plainly arises from the Majority Opinion that *any* action or activity that meets the definition of a "transaction" as found in Section 1(a) of *New York Dock* is immunized from the provisions of the Railway Labor Act and only "if feasible", whatever that may mean, "the transaction should reasonably accommodate existing collective bargaining agreements and collective bargaining rights" [pg. 33].

At pages 34-37, the Majority Opinion recognizes the transfer restrictions which Section 3(a) places upon the carriers [Majority Opinion, pg. 36] and acknowledges that

"given the mandate in Section 11347, there is some doubt that Section 11341(a) exempts *New York Dock* transactions from conflicting terms in prior merger protective agreements" and that "the ICC has not addressed this dilemma" [pg. 34]. However, the Majority Opinion then dismisses the specific requirement of Section 3 of *New York Dock* which preserves to an employee "the rights or benefits . . . which such employee may have under any existing job security agreement", such as the Orange Book in this proceeding, and which expressly provides that employee an unlimited election "between the benefits under this appendix [*New York Dock*] and similar benefits under such other arrangement", with the statement that "the ICC has emphasized that a transaction hurdles all legal obstacles preventing implementation." [Pg. 34.]

The Majority Opinion then observes that "most rights and benefits preserved to employees under Section 3 of the New York Dock conditions will be safeguarded through prudent applications of the reasonable accommodation standard" [pg. 34] but, later concludes that the "ICC's authorized transaction would be paramount to Orange Book Section 3(a)" if it "would operate to completely bar the transaction" [pg. 37]. No indication is given of what might be considered a "complete bar to the transaction". Certainly, as applied by the Majority Opinion, the Orange Book could not bar the "Raceland coordination" even if all employees involved were covered by its provisions although such a coordination in those circumstances would cost the carrier more money. Apparently, the expenditure of money in the protection of the rights of the employees would constitute a "bar" to the transaction. This would seem to be a reasonable conclusion since prior to the "Raceland coordination" the Orange Book had never been a "bar" because exemptions have always been negotiated permitting transfers. Now apparently they are all to be arbitrated because of this purported "bar" found by the Majority.

Because of its misuse of terms; its vague use of terms; and, its conclusions in contradiction of the facts, this

Majority Opinion will be utilized by all carriers in future proceedings in attempts to strip the Railway Labor Act rights and collective bargaining agreement rights of every employee involved in a coordination since apparently any efficiency or convenience of operations made attractive by a merger or common control of a carrier can be carried out as if it had been "authorized and approved" in advance by the ICC even where the ICC has been given no statutory jurisdiction to approve or authorize that particular activity or even has been made aware such activity may ever occur.

For the foregoing reasons, the Employees' Member of the Arbitration Committee dissents from an unfair, inequitable, and flagrantly erroneous majority opinion and award in this proceeding.

/s/ R.P. WOJTOWICZ
R.P. WOJTOWICZ
Employees' Member

CARRIERS' MEMBERS' REPLY TO DISSENT OF EMPLOYEES' MEMBER

1. The Employees' Member in his Dissent claims that the Committee errs in finding the Carriers' notice to be adequate and in failing to grant the Carmen's motion to reopen the hearing based on alleged discovery of new evidence. The adequacy of notice issue is a red herring that simply reflects the Carmen's continuing efforts to block the transaction through any means possible, however remote.

The Employees' Member's Dissent is based on a manifest misreading of the Carriers' written notice of the transaction that was provided to the Carmen on August 29, 1986. That notice clearly indicated that on or about December 31, 1986, the Waycross freight car heavy repair shop would be closed, and that all freight car heavy repair work and certain storeroom work then to be performed at Waycross would be transferred to Raceland, Kentucky. The notice indicated, by craft, the number of positions that the Carriers expected would be abolished at Waycross, and the number of positions that would be established at Raceland as a result of this transaction. The Carmen responded just four days later indicating that they would attempt to block the transaction and claiming, among other things, that the notice was inadequate.

The Employees' Member's Dissent misreads the notice and misrepresents the transaction by focusing on a particular covered hopper repair program that was to be performed at Tampa rather than at Waycross in 1987. Both the Neutral and the Carmen clearly understood that under the notice such work was not to be transferred to Raceland because the notice encompassed all work to be performed at Waycross at the expected time of implementation of the transaction in 1987. Indeed, the Carmen's prehearing Sub mission acknowledges at p. 20 that they were specifically informed during negotiations that the transfer to Raceland

included all heavy repair work otherwise to be performed at Waycross in 1987.

The Committee properly concluded at p. 29 that, since Waycross would be closed and all future Waycross heavy repair work would be transferred to Raceland, "the Carriers did not have to quantitatively or qualitatively describe the freight car repair work." More significantly, the Committee properly found that the notice requirement was met by the Carriers' good faith estimate of the number of employees that would be required to perform the quantum of work that would be transferred to Raceland. "Also the Carriers in good faith, estimated the number of employees in each class who would be involved in the force rearrangement. The notice laid the groundwork for meaningful negotiations. The Organization can hardly contend that it was ill-prepared for bargaining." Opinion at 29.

The Employees' Member's Dissent at p. 4 erroneously suggestes that the Carmen and the Neutral were somehow misled and that a factural error underlies the Committee's Opinion. No factual error has been made. The transaction always contemplated, and the Carmen and the Neutral clearly understood, that all heavy repair work that would have been performed at Waycross in 1987 was to be transferred to Raceland.

As recognized by the Committee, the Carmen's immediate and adamant opposition to the transaction in its entirety exposes its claim of notice deficiencies as simple obstructionism; the Carmen knew immediately what the proposed transaction involved and decided to attempt to block the transaction in any way possible.

The Carmen continued their obstructionist tactics with a last minute request to reopen the arbitration hearing based on alleged discovery of new evidence – the alleged transfer of covered hopper repair work from Waycross to Tampa – at a court hearing on January 9, 1987. The Employees' Member's Dissent completely misrepresents the facts and the basis for denial of that motion.

Carriers responded to the Carmen's motion by letter (copy attached hereto) which showed that no new evidence was discovered on January 9 that would justify reopening the hearing. Specifically, Carriers' letter informed the Committee that BRC General Chairman McAlpine testified on January 9 that he was aware of the alleged transfer of repair work from Waycross to Tampa no later than September 10, 1986, more than three months prior to the arbitration. Further, Carriers explained that the subject of the 1987 Tampa covered hopper repair program was raised by the Carmen and fully explained by Carriers officials at an October 1, 1986 meeting, more than two months prior to the arbitration. Carriers' letter stated that at the October 1 meeting, "Carriers' officials clearly and unequivocally explained that a covered hopper repair program was being assigned to Tampa for 1987, that Carriers had the right to determine where this repair program would be performed, that it had been performed at Tampa in the recent past, and that this program was not part of the 1987 car repair work at Waycross which was being transferred to Raceland." The Carmen could not and did not deny these facts in response to Carriers' letter. To the contrary, General Chairmen McAlpine testified in court that Tampa had historically performed repair programs on the same type cars as Waycross and that the Carriers had the right to determine whether a particular car repair program would be assigned to Tampa or Waycross.

The Carmen's knowledge of the 1987 Tampa repair program and their arguments based on the transfer of work from Waycross to Tampa are reflected in the Carmen's initial Submission to the Committee at p. 20. Thus, the conclusion of the Committee in its March 23 letter that freight car repair work going to Tampa is not new evidence justifying a reconsideration of the adequacy of the Carriers' notice is entirely proper.

The Carmen had more than adequate opportunity to challenge the Carriers' notice at the December 18 hearing based on the 1987 Tampa hopper repair program, which

they admittedly were aware of no later than September 10, 1986. That program represents work that would not be performed at Waycross in 1987, regardless of any transfer of Waycross positions to Raceland. The Carmen's allegation that 50% of 1986 Waycross work was being transferred to Tampa was unsubstantiated and erroneous, did not represent new evidence, was irrelevant to the adequacy of Carriers' notice, and afforded no basis for reopening the arbitration hearing.

2. It is apparent from the Employees' Member's Dissent that his primary dispute in the remaining portions of his Dissent is with the decisions of the Interstate Commerce Commission that have ruled that the Railway Labor Act and provisios of private collective bargaining agreements must "give way" when they "conflict with" the proposed implementation of an approved carrier consolidation or merger. He states in his dissent at p. 1: "The Commission, in the opinion of this Member, has irresponsibly strayed from the path it formerly travelled with regard to labor relations." The Committee properly recognized, however, that as an arm of the I.C.C. performing functions delegated to it under Article I, Section 4 of the *New York Dock* Conditions, this Committee was bound to adhere strictly to the Commission's interpretation of the Interstate Commerce Act and *New York Dock*.

The Employees' Member goes further, however, and accuses the Committee of improperly expanding the Commission's decisions to include situations where the carrier action allegedly "was never presented to or considered by the Commission." This charge is based on both an inaccurate factual premise and on a fundamental misunderstanding of the authority conferred on these Carriers in *CSX – Control*.

First, as the Committee's decision notes, the Carmen acknowledged during the proceedings before the Committee that the proposed shop consolidation here was a "transaction" within the meaning of *New York Dock* and that

this carrier action was, accordingly, taken pursuant to the authority the Commission conferred on the Carriers to create a single, consolidated rail system in *CSX – Control.*

BRC's admission is conclusive in this case. Since the shop consolidation is a *New York Dock* transaction, it is a transaction authorized by the I.C.C.; *i.e.*, it is admittedly an "action taken pursuant to authorizations of this Commission in which these provisions have been imposed." As an authorized transaction, the shop consolidation is governed by the I.C.C. policy atriculated in *D.R.G.W.* and *Maine Central* whereby collective bargaining agreements and Railway Labor Act rights are superseded to the extent they conflict with the authorized transaction. In view of the Carmen's admission, the scope of the authority conferred by the Commission on the Carriers in *CAX – Control* and the legal consequences that flow therefrom, whether or not the shop consolidation was specifically presented to or considered by the I.C.C. is simply not relevant.

Second, although the precise consolidation of the Waycross and Raceland shops now proposed was not identified in the short-term operating plan presented to the Commission in *CSX – Control*, the record in the proceedings before the Commission was replete with references to the acknowledged fact that, following the grant of control authority, the Carriers would engage in such consolidations where deemed to be economic and cost-efficient. Indeed, as Carriers demonstrated at pp. 16-21 of their initial submission, representatives of rail labor repeatedly stressed to the Commission that such consolidations would occur. Thus, the fact that there would be future consolidations was indeed "presented to" the Commission.

Third, the Commission clearly "considered" such long-term consolidations and the effects on employees in its decision in *CSX – Control.* As set forth at pp. 22-23 of Carriers' submission, the Commission acknowledged that "additional coordinations may occur that could lead to further employee displacements" but concluded that its standard

labor protection condition "will adequately protect those employees now identified as affected by the consolidation as well as those who may be affected in the future, but are not now identified specifically." *CSX – Control*, 363 I.C.C. at 589.

Thus, in approving the establishment of a single, consolidated CSX rail system, the Commission clearly found that not only the immediate consolidation of facilities and coordination of operations described in Carriers' short-term operating plan but also the long-term implementation of "additional coordinations" was in the public interest. In granting control authority, the Commission found it to be in the public interest that the Carriers be managed with "fully coordinated or integrated facilities and operations." *Peoria & E.Ry. Co. Stockholders v. New York Central R.R. Co.*, 334 I.C.C. 131, 151 (1968).

The attempt by the Employees' Member to draw a line between those facility consolidation that are specifically referred to in the short-term operating plan (and that, accordingly, can be carried out notwithstanding the RLA and any limitations in existing collective bargaining agreements) and those that are encompassed within or are pursuant to the control authority but are proposed some time after the I.C.C. proceedings are completed (and that, according to the union, can be carried out only after obtaining the union's permission through the long, drawn-out negotiating processes of the RLA) is a specious one that has no basis in the terms of the I.C.A. or prior I.C.C. decisions and indeed is inconsistent with the Carmen's admission that the Waycross-Raceland consolidation constitutes a *New York Dock* transaction under *CSX – Control.*

/s/ J. T. WILLIAMS
J. T. Williams
Carriers' Member

RESPONSE TO DISSENT

The Neutral Member of this Committee has invited each partisan member of the Committee to respond to the dissent of the other partisan member. I believe such responses to be novel, inappropriate, if not improper, and to serve no constructive purpose. Consequently, I will not respond to the dissent filed herein by the Carriers' partisan member of this Committee.

/s/ R. P. WOJTOWICZ
R. P. Wojtowicz

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

BROTHERHOOD RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES
3 Research Place
Rockville, MD 28050
(301) 948-4910

Plaintiff,

v.

CSX TRANSPORTATION, INC.
500 Water Street
Jacksonville, FLA 32202
(904) 359-3100

Defendant.

Civil Action
No. CV 286-243

VERIFIED COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

This action has been brought by plaintiff Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (BRAC) against defentant CSX Transportation, Inc. (CSX) to protect plaintiff's and its members' rights under the Railway Labor Act, 45 U.S.C. § 151, *et seg.*, and to prohibit defendant from proceeding by arbitration to obtain changes in existing rates of pay, rules or working conditions over plaintiff's objections.

PARTIES, JURISDICITON AND VENUE

1. Plaintiff Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes (BRAC), is an unincorporated labor organization with its principal headquarters at 3 Research Place, Rockville, Maryland 28050, and is a representative of employees as those terms are defined in Sections 1 Fifth and Sixth of the Railway Labor Act, 45 U.S.C. §§ 151 Fifth and Sixth. Plaintiff BRAC is the duly designated representative of certain employees of defendant CSX and has established through negotiations with defendant CSX and its predecessor and constituent railroad companies various rates of pay, rules and working conditions which govern the employment of those employees. On August 6, 1986, the Brotherhood Railway Carmen of the United States and Canada merged into BRAC and became a semi-autonomous division of BRAC known as Brotherhood Railway Carmen-Division of BRAC (BRC). The BRC maintains its headquarters at 4929 Main Street, Kansas City, Missouri 64112. The National Mediation Board transferred the designation of the Brotherhood Railway Carmen as representative of the Carmen's craft or class of employees under the Railway Labor Act on defendant and other railroads throughout the United States and Canada to BRAC upon the merger of the unions. BRC retains the responsibility of representing such employees as division of BRAC.

2. Defendant CSX Transportation, Inc. (CSX) is a unit of CSX Corporation which is a holding company whose subsidiaries included The C&O Railway Company, The B&O Railroad Company, and Seaboard System Railroad, Inc., all of which are Class I railroad corporations subject to the jurisdiction of the Interstate Commerce Commission (ICC) and are carriers as that term is defined in Section 1 First of the Railway Labor Act, 45 U.S.C. § 151 First. CSX is responsible for the operations of the subsidiary railroads.

3. This court has jurisdiction over this action under 28 U.S.C. §§ 1331 and 1337 (a) because the action arises under and seeks to enforce commands of the Railway Labor Act, an Act of Congress regulating interstate commerce. This Court has authority under 29 U.S.C. §§ 2201 and 2202 to issue the relief requested herein.

4. Venue is proper in this judicial district under 28 U.S.C. §1391(b) and (c) since the claim arose in this district and defendant CSX does business in this district through the Seaboard System Railroad (SSR).

COUNT I

5. On July 1, 1967, the Seaboard Air Line Railroad Company (SAL) and the Atlantic Coast Line Railroad Company (ACL) merged pursuant to the approval of the I.C.C. and become known as the Seaboard Coast Line Railroad Company (SCL).

6. In anticiaption of that merger, SAL, ACL and the labor organizations representing their employees, including the Brotherhood Railway Carmen, executed an agreement on November 3, 1966, for the protection of employees involved in that merger. That agreement because of its binding is commonly referred to as the Orange Book Agreement. A copy is attached as Exhibit A to this Complaint.

7. The Orange Book Agreement provides each employee covered thereby, with certain exceptions not here material, a guaranteed job for the remainder of his or her working life.

8. Consideration for this protection is found in Section 3(a) of that Agreement which provides in pertinent part:

> "(a) In consideration of the foregoing employee benefits the Merged Company shall, subject to compliance with the provisions of Appendix F attached hereto, be entitled to transfer the work of the employees protected hereunder throughout the [SAL-ACL] merged or consolidated system. . . ." [Exhibit A, § 3(a).]

In the absence of such a provision, such transfers of work would be in violation of Section 2 Seventh of the Railway Labor Act, 45 U.S.C. § 152 Seventh and of the applicable collective bargaining agreements.

9. On or about September 23, 1980, the I.C.C. in a proceeding designated Finance Docket 28905 (Sub. No. 1) and pursuant to Sections 11343-11345 and 11347 of the Interstate Commerce Act, 49 U.S.C. §§ 11343-11345 and 11347, approved a petition of the CSX Corporation to acquire control of the railroad subsidiaries of the Seaboard Coast Line Industries, including SCL, and the Chessie System, Inc., including C&O, and merge those holding companies into CSX Corporation.

10. As a result of this I.C.C. approval, CSX Corporation obtained control of some 16 railroads, most of which formerly had been in competition with each other, including SCL and the C&O. This approval of control did not affect the obligations of SCL to its employees under the provisions of the Orange Book Agreement.

11. The I.C.C.'s opinion accompanying its approval, which is attached as Exhibit B hereto, noted that:

> "The subsidiary rail carriers will remain as separate corporate entities:
>
> "[T]raffic must still be interchanged among the affiliated carriers, ..."
>
> "Applicants propose a number of projects designed to coordinate operations at points where the two systems meet."
>
> "These [employee] dislocations, however, are said to be short-lived. It is anticipated that all changes in employee positions will occur within 6 months following final approval of the applications." [Exhibit B, pp. 1 and 66.]

The projects referred to did not include the subject matter of this litigation, *i.e.*, the closing of the Waycross shop and transfer of work to Raceland, Kentucky.

12. Section 11347 of the Interstate Commerce Act, 49 U.S.C. §11347, provides in pertinent part that whenever the ICC approves a transaction under 49 U.S.C. §§11343, 11344, or 11345, such as the merger referred to in paragraph 9 hereof, the ICC "shall require the carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by the transaction as the terms imposed under this section [*i.e.*, §11347] before February 5, 1976, and the terms established under section 565 of title 45." The ICC has previously concluded that the employee protective provisions promulgated in *New York Dock Ry.–Control*, 360 I.C.C. 60, *aff'd. New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979), satisfy the minimum levels of protection required by 49 U.S.C. §11347. Those provisions are commonly referred to as the *New York Dock* conditions.

13. The I.C.C.'s approval of the CSX Corporation acquisitions was conditioned upon the railroads' application of the *New York Dock* conditions to each employee affected by the CSX Corporation's acquisition of control of the two holding companies. A copy of the *New York Dock* Conditions is attached as Exhibit C.

14. Article I, Section 4 of the *New York Dock* conditions provides as follows:

> (a) Each railroad contemplating a transaction which is subject to these conditions and may cause the dismissal or displacement of any employees, or rearrangement of forces, shall give at least ninety (90) days written notice of such intended transaction by posting a notice on bulletin boards convenient to the interested employees of the railroad and by sending registered mail notice to the representatives of such interested employees. Such notice shall contain a full and adequate statement of the proposed changes to be affected [sic] by such transaction,including an estimate of the number of employees of each class affected by the intended changes. Prior to consummation the parties shall negotiate in the following manner.

Within five (5) days from the date of receipt of notice, at the request of either the railroad or representatives of such interested employees, a place shall be selected to hold negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this appendix, and these negotiations shall commence immediately thereafter and continue for at least thirty (30) days. Each transaction which may result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4. If at the end of thirty (30) days there is a failure to agree, either party to the dispute may submit it for adjustment in accordance with the following procedures:

(1) Within five (5) days from the request for arbitration the parties shall select a neutral referee and in the event they are unable to agree within said five (5) days upon the selection of said referee then the National Mediation Board shall immediately appoint a referee.

(2) No later than twenty (20) days after a referee has been designated a hearing on the dispute shall commence.

(3) The decision of the referee shall be final, binding and conclusive and shall be rendered within thirty (30) days from the commencement of the hearing of the dispute.

(4) The salary and expenses of the referee shall be borne equally by the parties to the proceeding; all other expenses shall be paid by the party incurring them.

(b) No change in operations, services, facilities or equipment shall occur until after an agreement is reached or the decision of a referee has been rendered.

15. Section 2 of the *New York Dock* conditions provides:

> The rates of pay, rules and working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

16. On or about August 29, 1986, CSX, purportedly pursuant to Article I, Section 4 of the *New York Dock* conditions imposed in Finance Docket 28905, served a notice upon the representatives of BRC, all other shop craft unions and BRAC, that the SCL freight car heavy repair shop in Waycross, Georgia would be shut down on or about December 31, 1986, and the freight car heavy repair work, along with certain store room work "will be transferred to the Chesapeake and Ohio Railway Company's freight car heavy repair shop at Raceland, Kentucky", more than 500 miles distant. The notice also indicated that the work would be removed from the SCL/BRC collective bargaining agreement and placed under the C&O/BRC collective bargaining agreement and that 149 jobs would be abolished at Waycross and 107 established at Raceland. This notice is attached as Exhibit D hereto.

17. On September 2, 1986, Lawrence W. McAlpine, Jr., as BRC General Chairman representing the interests of employees in the carman craft or class on SCL, wrote CSX stating that the content of the CSX notice of August 29, 1986, was improper and that, in addition, the proposed transfers were effectively barred by the Orange Book Agreement and the collective bargaining agreements governing rates of pay, rules and working conditions of BRC-represented employees. A copy of this letter is attached as Exhibit E.

18. A series of meetings and correspondence between Mr. McAlpine and CSX then followed which culminated

in Mr. McAlpine informing CSX by letter of November 4, 1986, that the proposed closing of the Waycross shop on the SCL and removal of that railroad's work to a C&O shop in Kentucky was not authorized by the I.C.C. in Finance Docket 28905 and therefore, the matter was not subject to the *New York Dock* conditions imposed in that proceeding. The correspondence is attached hereto as Exhibits F, G., H, and I, respectively. The November 4, 1986 letter is Exhibit I.

19. Article I, Section 4, where applicable, requires arbitration of disputes regarding implementing agreements. An arbitration hearing is set for December 18, 1986, in Jacksonville, Florida. CSX was requested to postpone arbitration until this Court has an opportunity to rule in this matter but has refused to do so.

20. The unilateral closing the SCL freight car heavy repair shop in Waycross, Georgia, and the transfer of the work involved to the C&O shop at Raceland, Kentucky, constitutes a unilateral change in the working conditions of the affected employees in violation of the prohibitions of Section 2 Seventh and Section 6 of the Railway Labor Act, 45 U.S.C. §§152 Seventh, 156, and defendant's attempt to compel arbitration to accomplish its goal violates the provisions of Section 7, quoted in full in paragraph 28 below. Neither is such action authorized by the Interstate Commerce Commission decision of September 23, 1980, approving the acquisitions set forth in paragraph 9 above.

21. The change in freight car heavy repair work contained in the CSX notice of August 29, 1986, cannot be implemented pursuant to the *New York Dock* conditions; and, the arbitration proceeding scheduled for December 18, 1986, pursuant to those conditions, has no legal basis under such conditions and the Interstate Commerce Commission order of September 23, 1980.

22. In violation of the agreements with the BRC, the above-referenced provisions of the Railway Labor Act and

the very provision of the *New York Dock* conditions under which CSX claims authority to make the subject transfer which provides in subsection 4(b) thereof that "no change in operations, services, facilities, or equipment shall occur until after an agreement is reached or the decision of a referee has been rendered", the defendant CSX for a period of at least three weeks has been engaged in dismantling the physical plant at the Waycross freight car heavy repair shop and moving the equipment therein away from that facility. See affidavit of Lawrence McAlpine attached hereto as Exhibit J.

COUNT II

23. All of the allegations of paragraphs 1 through 22 of this complaint are hereby incorporated and adopted in support of this Count II.

24. The collective bargaining agreement maintained by BRC with SCL provides that the work therein described shall belong to carmen employed by SCL. It is that work which CSX's notice would remove from the SCL railroad and the SCL/BRC agreement and place on the C&O railroad under the C&O/BRC agreement. The relevant provisions of the SCL/BRC agreement are attached hereto as Exhibit K.

25. The Orange Book Agreement provides its protections to approximately one-half of the BRC-represented employees who will be affected.

26. CSX would require employees covered by the Orange Book protections to leave their carrier-employer for employment with another railroad (C&O) not a party to the Orange Book Agreement.

27. The Orange Book Agreement, the collective bargaining agreements, the New York Dock Conditions, and the 1980 decision of the I.C.C. authorizing CSX control do not authorize or permit the changes in SCL rules and working conditions sought by CSX.

28. The Railway Labor Act in Section 7, First, 45 U.S.C. §157 First, expressly prohibits such changes to be compelled by arbitration:

> "Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in the preceding sections, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: *Provided, however*, That the failure or refusal of either party to submit a controversy to arbitration shall *not* be construed as a violation of *any* legal obligation imposed upon such party by the terms of this Act *or otherwise*." (Emphasis supplied.)

29. Section 2 Seventh of the Railway Labor Act, 45 U.S.C. §152 Seventh, provides that defendant CSX and its SCL and C&O subsidiaries may not "change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in Section 6 of this Act".

30. Section 6 of the Railway Labor Act, 45 U.S.C. §156, provides that defendants CSX and its SCL and C&O subsidiaries:

> [S]hall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board has proffered its services, rates of pay, rules or working conditions

shall not be altered by the carrier until the controversy has been finally acted upon as required by Section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

31. Section 2 Seventh and Section 6 of the Railway Labor Act prohibit defendant CSX from implementing the transaction set forth in its notice of August 29, 1986. The transaction proposed by CSX involves a renegotiation of collective bargaining agreements which can be effected only through Sections 5, 6 and 10 of the Railway Labor Act, 45 U.S.C. §§155, 156, and 160. Effectuation of the proposed transaction can be accomplished only through the *voluntary* arbitration procedures of Section 7 First of the Railway Labor Act after the negotiation and mediation processes of the Act have failed to produce a voluntary agreement.

32. The proposed change in freight car heavy repair work as contained in the CSX notice of August 29, 1986, is in violation of the requirements of Sections 5, 6, 7, and 10 of the Railway Labor Act, 45 U.S.C. §§155, 156, 157, 160, and cannot be effectuated through the arbitration conducted under Article I, Section 4 of the *New York Dock* conditions scheduled for December 18, 1986, nor can the CSX rely upon the plenary power of the Interstate Commerce Commission under Section 11341(a) of the Interstate Commerce Act, 49 U.S.C. §11341(a), to give it a right to compel arbitration in this case.

WHEREFORE, plaintiff BRC respectfully requests that this Court grant it the following relief:

A. Issue a judgment declaring that the Railway Labor Act prohibits defendant CSX by itself or through its SCL and C&O subsidiaries from changing rates of pay, rules or working conditions of SCL employees by removing work covered by the SCL/BRC agreement from the SCL and transferring it to the C&O unless the mandatory

provisions of Sections 5, 6 and 10 of that Act are first exhausted;

B. Issue a judgment declaring that the Railway Labor Act prohibits defendant CSX by itself or through its SCL and C&O subsidiaries from forcing its employees to accept employment with another railroad through the vehicle of compulsory arbitration on penalty of forfeiting economic protection;

C. Issue a judgment declaring that the Railway Labor Act prohibits defendant CSX by itself or through its SCL and C&O subsidiaries from changing the rates of pay, rules or working conditions of SCL employees as embodied in the Orange Book Agreement without following the procedures of the Railway Labor Act;

D. Issue a judgment declaring that defendant CSX by itself or through its SCL and C&O subsidiaries may not rely upon Article I, Section 4 of the *New York Dock* conditions to compel plaintiff BRAC to arbitrate changes to existing rates of pay, rules or working conditions as embodied in the SCL/BRC collective bargaining agreement and the Orange Book Agreement;

E. Issue an interlocutory and permanent injunction restraining defendant CSX, its officers, directors, agents, or anyone alse under its control or acting in its behalf, from applying or enforcing any arbitration award which may be issued in the arbitration presently scheduled for hearing on December 18, 1986, in Jacksonville, Florida, before arbitrator John B. LaRocco; and,

F. Grant plaintiff such other and further relief as this Court deems to be just and proper.

Respectfully submitted,

/s/ JOHN J. DELANEY
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Date: December 17, 1986

Supreme Court, U.S.
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No. 88-1014

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BROTHERHOOD OF RAILWAY CARMEN,
DIVISION OF TRANSPORTATION • COMMUNICATIONS
INTERNATIONAL UNION,
Petitioner,

v.

CSX TRANSPORTATION, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

REPLY BRIEF FOR PETITIONER

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IN THE

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OCTOBER TERM, 1988

No. 88-1014

BROTHERHOOD OF RAILWAY CARMEN,
DIVISION OF TRANSPORTATION•COMMUNICATIONS
INTERNATIONAL UNION,
Petitioner,

v.

CSX TRANSPORTATION, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

This reply brief is respectfully submitted by petitioner Brotherhood of Railway Carmen, Division of Transportation•Communications International Union [hereinafter, "BRC"] in response to the brief by respondent in opposition to this petition.

I. CONTRARY TO RESPONDENT'S ASSERTIONS, THIS CASE INVOLVES THE INTEGRITY OF CONGRESSIONAL RAIL LABOR POLICY

Respondent and the Court of Appeals have viewed the action brought by BRC as one seeking to enjoin implementation of an arbitration award to which the union is a party. Such a view misapprehends the legal basis of this case.

Petitioner BRC brought this action to enjoin a threatened violation of rights secured by the Railway Labor Act to BRC-represented employees on the CSX Transportation, Inc. railroad, formerly known as the Seaboard Coast Line Railroad Company [hereinafter, "CSXT"].

At the time of the filing of the suit, CSXT had invoked the compulsory arbitration procedures of conditions imposed by statutory mandate for the protection of the interests of employees affected by the 1980 Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] order approving CSX Corporation's control of two theretofore independent, competitive railroad systems. The purpose and effect of CSXT's action was to secure *changes* in the rates of pay, rules and working conditions of certain of its employees *by compulsory arbitration* rather than through the procedures of the Railway Labor Act. Petitioner respectfully maintains such changes can be accomplished only in accordance with the procedures designated by Congress in the Railway Labor Act for that purpose. This action was brought to enjoin CSXT from violating BRC's right to have the proposed changes effected only in accordance with that Act and to restrain CSXT from the misuse of the Commission's 1980 order and the employee protective conditions imposed upon CSXT by that order.[1]

---

[1] Protective conditions imposed under section 11347, [formerly section 5(2)(f)] of the Interstate Commerce Act have long been recognized as obligations imposed upon the railroad employer to protect the interests of its employees. *See e.g. Southern Ry. Co.—Control—Central of Georgia Ry. Co.*, 331 I.C.C. 151 at 169 (1967):

> Also, we point out that, under section 5(2)(f), we impose formulae of protective conditions *upon the carriers* seeking specific permissive authority under section 5(2) of the act, the purpose being to *protect* the interests of employees some of which in a particular case may well have been established under bargaining agreements executed pursuant to the Railway Labor Act. Rights obtained by employees under section 5(2)(f) are the minimum protection which an applicant carrier must provide in order to obtain this Commission's approval of its transaction. (Emphasis by the ICC.)

BRC does not attack the 1980 ICC order in this proceeding. It does not challenge the validity of that order. Petitioner does challenge CSXT's *use* of that order. It is respondent's use of that order that violates the rights of BRC and the employees it represents.

By no stretch of reason can it be argued that this action was commenced to enjoin implementation of an arbitration award as stated by the Court of Appeals (Appendix A at 2a and 8a) and as contended by CSXT. Resp. Br. at i. The complaint was filed before arbitration had even begun and was directed against CSXT's violation of employees' Railway Labor Act and collective bargaining agreement rights by its misuse of the 1980 Commission order upon which it relied. Resp. App. at A-79, *et seq.* Petitioner respectfully submits that the District Court correctly viewed the issue in this case (Appendix B at 17a), although BRC disagrees with the District Court's conclusion that "without an exemption pursuant to 49 U.S.C. § 11341, CSX would be unable to implement the shop transfer" (Appendix B at 21a) and its conclusion that "the proposed shop transfer is necessary to effectuate the CSX merger" (Appendix B at 20a, 21a), for the reasons that implementation of shop transfers have taken place successfully on this and other railroads for many years through the procedures of the Railway Labor Act and the CSX merger had been fully consummated many years before this particular shop transfer dispute arose.

Reduced to its essentials, the conflict here is between those provisions of the Railway Labor Act which impose certain obligations upon CSXT and § 11341(a) of the Interstate Commerce Act which exempts ICC orders from the operation of certain laws in certain circumstances.

As noted throughout the order of the District Court (Appendix B at 11a, *et seq.*), CSXT relies upon 49

U.S.C. § 11341(a) as a complete defense to its actions. Petitioner, on the other hand, relies upon the procedures which Congress laid out in the Railway Labor Act as the exclusive means of changing rates of pay, rules and working conditions of employees in the railroad industry and its clear prohibition against such employees being forced to arbitrate those issues.[2] In its complaint at paragraph 20, BRC clearly set out its claim of statutory violations. Resp. App. at A-86.

This case, as presented to the courts below and this Court, involves the interpretation and application of the authority granted CSXT by ICC orders issued pursuant to Sections 11343(a) and 11344 of the Interstate Commerce Act, 49 U.S.C. §§ 11343(a), 11344, and the exemption contained in Section 11341(a), 49 U.S.C. § 11341 (a), against the conflicting procedures and prohibitions of Sections 2 First, 2 Seventh, 5 First, 6 and 7 First of the Railway Labor Act, 45 U.S.C. §§ 152 First, 152 Seventh, 155 First, 156 and 157 First, upon actions which CSXT desired to undertake (and has since accomplished).[3]

---

[2] Section 7 First of the Railway Labor Act, 45 U.S.C. § 157 First provides:

> Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in the preceding sections, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: *Provided*, however, That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of *any legal obligation* imposed upon such party by the terms of this Act *or otherwise*. (Emphasis supplied.)

[3] Following the arbitrator's decision which fully favored CSXT, except in prohibiting CSXT from requiring the transfer of the employees protected by the Orange Book protection agreement, CSXT appealed and BRC cross-appealed. Appendix A at 6a. Over a

The controlling legal principle in this case is similar to that which was before this Court in *Seaboard Coast Line v. Daniel*, 333 U.S. 118 (1948). In that case, a railroad which had been authorized by the ICC under the merger provisions of the ICA to acquire and operate lines in South Carolina brought a suit in a South Carolina state court for a declaratory judgment that it could operate such lines without first complying with South Carolina constitutional and statutory provisions requiring such operations to be conducted only by state-created corporations. The state, although questioning the validity of the ICC order as a basis for relief, did not seek to have it set aside or its enforcement enjoined. *Id.* at 122-123. This Court *sua sponte* considered the question of whether the exclusive jurisdiction of federal district courts to annul, enjoin, set aside or suspend orders of the ICC under then 28 U.S.C. § 46 [now restricted to Courts of Appeal under 28 U.S.C. § 2321], deprived the state court of jurisdiction to entertain the railroad's complaint. This Court noted that while the defendant "did question its validity as a basis for relief sought in the complaint", it did not seek to have the ICC order set aside or enjoined. *Id.* at 123. Although this Court recognized that there was indeed, as between the parties, "a bona fide controversy . . . over the validity of the order" (*id.*), this Court held that, notwithstanding the existence of 28 U.S.C. § 46, the railroad properly sought relief in the state court. *Id.* This Court further concluded that the

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year later the Commission issued its decision (Appendix A at 7a), affirming that part of the arbitrator's award favorable to CSXT and reversing that part of the award favorable to the affected employees. Appendix C at 23a, *et seq.* A petition to review that action of the ICC is pending in the United States Court of Appeals for the District of Columbia Circuit in *BRC v. CSXT*, D.C. Cir. No. 88-1794. The issue of rail labor's right to protect itself in a District Court against violations of its Railway Labor Act rights when confronted by a defense based upon 49 U.S.C. § 11341(a) is not present in that case, just as the issue of the validity of an ICC order or an arbitration award issued thereunder is not present here.

state court had authority to determine "whether the order, properly interpreted, did exempt the appellant [railroad] from compliance with the state railroad corporation laws, and, if so, *whether the Commission had transcended its statutory authority in making the order.*" *Id.* (citations omitted; emphasis supplied.)

In the instant case, petitioner seeks to sustain its statutory rights under the RLA and to determine whether CSXT has exceeded the authority granted it by the Commission's order under the Interstate Commerce Act; *i.e.* whether the order, properly interpreted, exempted the railroad from federal railroad labor law as set forth in the Railway Labor Act; and, "if so, whether the Commission has transcended its statutory authority in making the order." *Id.*

In the *Seaboard* case, this Court held that a court of otherwise appropriate jurisdiction was not deprived of that jurisdiction by the congressional restrictions on jurisdiction to review orders of the Interstate Commerce Commission as then set forth in 28 U.S.C. § 46. Applying the *Seaboard* principle to this case, the United States District Court had jurisdiction under 28 U.S.C. § 1337 to determine whether the Railway Labor Act rights of CSXT employees were being violated and, if so, whether 49 U.S.C. § 11341(a) empowered the Commission to exempt CSXT from its statutory and contractual obligations to its employees. *See also, Brotherhood of Locomotive Engineers v. Chicago and North Western Railway Co.*, 314 F.2d 424, 428 (8th Cir. 1963).

Petitioner respectfully submits that it has the right to seek in a district court an injunction to prohibit a violation of its and its member-employees' Railway Labor Act and collective bargaining agreement rights by a railroad-employer acting under color of an order of the ICC which it claims supercedes those employees' rights by virtue of the existence of 49 U.S.C. § 11341(a).

The district court in this case faced a classic example of the situation outlined in the concurring opinion of Justice Stevens in *Interstate Commerce Commission v. Brotherhood of Locomotive Engineers*, 482 U.S. ——, 96 L.Ed. 2d 222, 247 n.13 (1987):

> Any tribunal faced with a claim that a party is violating some "other law" has the responsibility of determining whether an exemption is "necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control of franchises acquired through the transaction." 49 U.S.C. § 11341. *See Railway Express Agency, supra*, at 215-218.

The district court, we respectfully submit, properly framed the issue before it[4] but failed to give proper weight to the "necessity" component of 49 U.S.C. § 11341(a) when it erroneously held that the authority provided the Commission by § 11341(a) superceded the Railway Labor Act and contract rights of the employees in the circumstances of this case. *Id.*

Regents of the University System of Georgia v. Carroll, et al., 338 U.S. 586, 94 L.Ed. 363 (1950), presented a similar issue. In that case, the Federal Communications Commission [hereinafter, "FCC"] had held that, unless a contract made by a radio licensee with a broadcasting company for the purchase of stock was repudiated, a renewal of the radio license would not be in the public interest. The licensee repudiated the contract as required by the FCC, returned to the FCC and obtained renewal of its license. *Id.* at 590-592. The other party to the contract, the broadcasting company, sued in the state courts for an accounting on the contract and obtained a favorable judgment. The licensee, the Regents, defended on the ground "that to permit recovery would be an interference with the [FC] Commission's power over broadcasting." *Id.* at 593. Among the specific stat-

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[4] *See* Petition for Writ of Certiorari herein at 6-7.

utory authorities relied upon by *Regents* was section 303(r) of the Communications Act of 1934, 47 U.S.C. § 303(r), which empowered the FCC to "make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter."

This Court framed the issue presented by these circumstances as follows:

> May a state now enforce the repudiated contract against the applicant [Regents] although this would have the practical effect of nullifying the repudiation required by the Commission?

Id. at 588. This Court answered in the affirmative. The Court reviewed the statutory authority of the FCC and found lacking therein authority to impose conditions upon an applicant directly affecting the applicant's responsibilities to a third party dealing with the applicant. *Id.* at 600.[5]

The *Regents* case supports the principle that a defense based upon a federal agency's supervening authority does not affect the jurisdiction of a court, otherwise appropriately invoked, to entertain and resolve a dispute even where it involves interpretation of the law governing the federal agency. Petitioner respectfully submits the issue now before this Court for resolution is based upon

[5] At 338 U.S. 600 this Court ruled:

> One suggestion is that petitioner's position has a specific statutory basis in § 303(r), which permits the Commission to prescribe such "conditions" as are "necessary to carry out the provisions" of the Act. We do not think the suggestion is sound. Congress has enabled the Commission to regulate the use of broadcasting channels through a licensing power. It is in connection with this power that § 303(r) is to be interpreted. The Commission may impose on an applicant conditions which it must meet before it will be granted a license, but the imposition of the conditions cannot directly affect the applicant's responsibilities to a third party dealing with the applicant.

the same principle, and should be reviewed, for the decision below conflicts with the above decisions of this Court.

II. THERE IS URGENT NEED FOR RESOLUTION OF EMPLOYEES' RIGHT TO REDRESS RAILWAY LABOR ACT VIOLATIONS

Section 11341(a) and its predecessors have been part of the Interstate Commerce Act far longer than has the mandatory employee protection of Section 11347 of that Act which was first included by the 1940 amendments of the ICA. Transportation Act of 1940, Section 7, 54 Stat. 898, 906-07.[6] Until recently, it was not used as a vehicle to supercede the Railway Labor Act and collective bargaining agreement rights of railroad employees.[7]

As pointed out in the Petition for Writ of Certiorari at pages 11 and 12, the Railway Labor Act rights of employees have been declared by railroad management to be superceded by any order of the ICC which approves transactions subject to subchapters 109 and 113 of the ICA.

Each time rail labor seeks to restrain violations of its Railway Labor Act and contract rights, it is met with the carrier's defense that ICC authority supercedes those rights and therefore rail labor's action constitutes a collateral attack upon an ICC order. The courts of appeal are not in agreement on this issue as the citations at page 12 of the Petition for Writ of Certiorari indicate. Indeed, the Court apparently recognized the need to address this issue by its grant of certiorari in No. 87-1888, *Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Association* and its decision to hold in abeyance the

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[6] Section 11341(a) was first enacted as a part of section 407 of the Transportation Act of 1920, ch. 91, 41 Stat. 456, 482.

[7] *See, e.g. Leavens v. Burlington Northern*, 348 I.C.C. 962, 975, 977 (1977); *Southern Ry—Control—Central of Georgia Ry. Co.*, 331 I.C.C. 151, 169 (1967); *Chicago, Minneapolis & Omaha Ry.—Lease*, 295 I.C.C. 596, 702 (1958).

petition in No. 87-1911, *RLEA v. Guilford Transportation Industries, Inc.* Pittsburgh and Lake Erie R.R. and two *amici* have relied upon the collateral attack concept in challenging the Third Circuit's decision in No. 87-1888. The decision by the Court in that case may well resolve this issue. Therefore, it is respectfully suggested that if this Court does not grant certiorari herein that this case be held in abeyance until No. 87-1888 is decided and then reexamine the issue of whether certiorari should be granted.

Again we wish to emphasize that rail labor, rail management and the courts need guidance from this Court as to the proper forum for action brought to redress violations of Railway Labor Act rights when the Interstate Commerce Act is raised as a defense.

CONCLUSION

For the reasons set forth above, petitioner respectfully submits that the writ should be granted or, in the alternative, that this case be held in abeyance pending this Court's disposition of No. 87-1888, *Pittsburgh & Lake Erie R.R. v. RLEA*.

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